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MUNICIPAL BOARD DECISIONS

VOLUME FIVE-A/1986

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

R.H. BLOIS, Q.C., — Chairman

ELIZABETH SALTON — Vice-Chairman

RICHARD L. WELDON — Member

* * * * *

DOREEN WHITE — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JANUARY 1, 1986 TO DECEMBER 31, 1986

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTFR 9, STATUTES OF NOVA SCOTIA, 1981.

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THIS VOLUME OF THE 1986 DECISIONS OF THE NOVA SCOTIA MUNICIPAL BOARD CONTAINS HEADNOTES WHICH SUMMARIZE THE DECISIONS. THESE HEADNOTES ARE NOT PART OF THE DECISIONS. THE MUNICIPAL BOARD WHILE IT HAS AUTHORIZED AND APPROVED OF THE PUBLICATION OF THESE HEADNOTES ASSUMES NO RESPONSIBILITY FOR THE CONTENT OR THE ACCURACY OF THE HEADNOTES.

ASSESSMENT

CASE TABLE

Bank of Nova Scotia, Halifax (City) v. 232

Canadian Imperial Bank of Commerce, Halifax (City) v. (see Halifax (City) v. Bank of Nova Scotia) 232

Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.) 1

Cummings v. Director of Assessment (N.S.) 26

Director of Assessment (N.S.), Country Harbour Hardwoods (1984) Ltd. v. 1

Director of Assessment (N.S.), Cummings v. 26

Director of Assessment (N.S.), General Mining Building Ltd. v. 252

Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

Director of Assessment (N.S.), Manchester Properties Ltd. v. 111

Director of Assessment (N.S.), National Sea Products Ltd. v. 129

Director of Assessment (N.S.), Nowlan v. 185

Director of Assessment (N.S.), Trizec Equities Ltd. v. 193

General Mining Building Ltd. v. Director of Assessment (N.S.) 252

Gulf Canada Ltd., Director of Assessment (N.S.) v. 297

Halifax (City) v. Bank of Nova Scotia 232

Halifax (City) v. Canadian Imperial Bank of Commerce (see Halifax (City) v. Bank of Nova Scotia) 232

Halifax (City) v. Royal Bank of Canada (see Halifax (City) v. Bank of Nova Scotia) 232

Manchester Properties Ltd. v. Director of Assessment (N.S.) 111

National Sea Products Ltd. v. Director of Assessment (N.S.) 129

Nowlan v. Director of Assessment (N.S.) 185

Royal Bank of Canada, Halifax (City) v. (see Halifax (City) v. Bank of Nova Scotia) 232

Trizec Equities Ltd. v. Director of Assessment (N.S.) 193

ASSESSMENT

STATUTE TABLE

ASSESSMENT ACT, R.S.N.S. 1967, c.14

s.1(a)(v)
National Sea Products Ltd. v. Director of Assessment (N.S.)... 129
Trizec Equities Ltd. v. Director of Assessment (N.S.) 193

s.1(a)(vi)
Halifax (City) v. Bank of Nova Scotia 232

s.3(1)(a)(d)
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

s.7(2)(5), 25B(1)
Manchester Properties Ltd. v. Director of Assessment (N.S.) .. 111

s.31,33(1),(2),(3),(4)
Cummings v. Director of Assessment (N.S.) 26

s.38
Cummings v. Director of Assessment (N.S.) 26
General Mining Building Ltd. v. Director of Assessment (N.S.). 252
National Sea Products Ltd. v. Director of Assessment (N.S.)... 129

s.39(1)
General Mining Building Ltd. v. Director of Assessment (N.S.). 252

s.40B(1)
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

s.64(1)(a)
Trizec Equities Ltd. v. Director of Assessment (N.S.) 193

s.66(3)
Cummings v. Director of Assessment (N.S.) 26

s.77
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

s.77(2),(3),86(1),(2),(3)
Cummings v. Director of Assessment (N.S.) 26

s.89(1)(a)
Cummings v. Director of Assessment (N.S.) 26
Manchester Properties Ltd. v. Director of Assessment (N.S.)... 111

s.91(1)(a)
National Sea Products Ltd. v. Director of Assessment (N.S.)... 129

s.91(1)(b),94,98(2)
Cummings v. Director of Assessment (N.S.) 26

s.99
Cummings v. Director of Assessment (N.S.) 26
National Sea Products Ltd. v. Director of Assessment (N.S.).. 129

s.100(1)
Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.) 1
Cummings v. Director of Assessment (N.S.) 26
General Mining Building Ltd. v. Director of Assessment (N.S.) 252

s.100(2)
Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.)... 1
Cummings v. Director of Assessment (N.S.) 26

s.100(3)
Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.)... 1
Cummings v. Director of Assessment (N.S.) 26
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

s.101
Cummings v. Director of Assessment (N.S.) 26
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

s. 101(1)
General Mining Building Ltd. v. Director of Assessment (N.S.) 252

s.108(1)
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

COMPANIES ACT, R.S.N.S., 1967, c.42

s.68,69
Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.) 1

INTERPRETATION Act, R.S.N.S., 1967, c.151

s.24(2)
Trizec Equities Ltd. v. Director of Assessment (N.S.)....... 193

MUNICIPAL BOARD ACT, S.N.S., 1981, c.9

s.4
Cummings v. Director of Assessment (N.S.) 26

s.16(1)
Halifax (City) v. Bank of Nova Scotia 232

s.22(2)
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

s.25,27(1),(2),(4),45
Cummings v. Director of Assessment (N.S.) 26

PARTNERSHIPS & BUSINESS NAMES REGISTRATION ACT, R.S.N.S., 1967, c.225

s.1(a),3(2),18
Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.) 1

ASSESSMENT
SUBJECT TABLE

Assessment - Business Occupancy - Rate to be applied - whether occupancy for the purposes of a restaurant.
Manchester Properties Ltd. v. Director of Assessment (N.S.) ... 111

Assessment - Commercial - business occupancy - jurisdiction - person aggrieved - failure to serve notice(s) of appeal on clerk and recorder.
County Harbour Hardwoods (1984) Ltd. v. Director of Assessment (N.S.) 1

Assessment - Commercial - Pumps, tanks, etc. - ownership and exemption - jurisdiction of the Board - whether agreement of facts used before Regional Assessment Appeal Court admissible without consent before Board.
Director of Assessment (N.S.) v. Gulf Canada Ltd. 297

Assessment - Commercial - land and office building - market value - market data, cost on income approach - income approach applied - effect of option to purchase clause in lease of rental property.
General Mining Building Ltd. v. Director of Assessment (N.S.).. 252

Assessment - Commercial - whether data processing and equipment "assessable property" - whether equipment is used in "processing" or "manufacturing".
Halifax (City) v. Bank of Nova Scotia 232

Assessment - Commercial - business occupancy - market value - cost approach - physical depreciation, functional obsolescence and economic obsolescence - estimates subjective - more experienced and qualified appraiser/assessor preferred - whether pipes and ducts part of building - functional test.
National Sea Products Ltd. v. Director of Assessment (N.S.).... 129

Assessment - Commercial - Assessable property - additional seven storeys under construction - whether fact addition is incomplete and not ready for occupation affects assessability.
Trizec Equities Ltd. v. Director of Assessment (N.S.).......... 193

Assessment - Residential - hearing process - jurisdiction - failure to notify co-owners - valuation - income, market data, cost approaches - selection of comparables for market data approach.
Cummings v. Director of Assessment (N.S.) 26

Assessment - Residential - cost approach - onus on appellant - market data useful for general confirmation.
Nowlan v. Director of Assessment (N.S.) 185

Country Harbour Hardwoods (1984) Ltd. v. Director of Assessment

ASSESSMENT--COMMERCIAL AND BUSINESS OCCUPANCY--JURISDICTION--PERSON AGGRIEVED--FAILURE TO SERVE NOTICE(S) OF APPEAL ON CLERK AND RECORDER--ASSESSMENT ACT, SS. 100(1),(2),(3)--COMPANIES ACT, SS. 68, 69--PARTNERSHIPS AND BUSINESS REGISTRATION ACT, SS. 1(a), 3(2), 18

This is an appeal from a decision of the Antigonish-Guysborough Regional Assessment Appeal Court confirming the assessment of the Appellant's real property, certain machinery and business occupancy. The Director questioned the Board's jurisdiction to hear the appeal.

HELD: The appeal is dismissed for lack of jurisdiction on the part of the Board, without costs to any party.

The original owner of the subject property was Country Harbour Hardwoods Ltd. It went into receivorship. After filing the Notice(s) of Appeal the assets of this company were sold to an Ontario numbered company. There never has been a company incorporated under the name of Country Harbour Hardwoods (1984) Ltd., the Appellant herein. That company is not a body corporate. For there to be an appeal on the merits, the Appellant must fit himself within the definition of "any person aggrieved" within the meaning of s. 100(1) of the Assessment Act. Country Harbour Hardwoods Ltd. is not the Appellant and even if it was it may not be a "person aggrieved" since it may not suffer possible loss or possible gain from the eventual disposition of this appeal. The Ontario numbered company is not an "aggrieved person" either. It no longer has any interest in either land or equipment and can suffer no harm or receive no benefit from the disposition of this appeal. A second Ontario numbered company could be now an aggrieved person but it could not mount an assessment appeal without registration and compliance with the Partnerships and Business Registration Act and the Companies Act, which it has not done. Thus none of the persons mentioned in the evidence as having to do with the assessment and/or occupation and/or ownership of the subject property at any relevant time and who have sought to bring this appeal forward exist as a person who has signed a Notice of Appeal or otherwise than as an illegal "partnership." There is, thus, no Appellant. The appeal period has now expired so that no further Notice of Appeal could be filed. There also was a failure to prove service of the Notice(s) of Appeal on the Clerk of the Municipality and the Recorder. This also is a ground on which the appeal must be dismissed.

NSMB-112-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **COUNTRY HARBOUR HARDWOODS (1984) LTD.** from the decision of the Nova Scotia Regional Assessment Appeal Court, Antigonish, Guysborough Assessment Region, dated March 20, 1985, confirming the assessment of the land and pallet plant of the Appellant in the District of St. Mary's Sherbrooke, Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: ELIZABETH O'FARRELL, LL.B., for the Appellant, Country Harbour Hardwoods (1984) Ltd.

WILLIAM M. WILSON, LL.B., for the Director.

DECISION

This is an assessment appeal commenced by a Notice of Appeal in the form of a letter or letters to "Director of Assessment" signed by **"COUNTRY HARBOUR HARDWOODS (1984) LTD., DAVID N. BEESWANGER, GENERAL MANAGER"**, the first of which, dated May 13, 1985, was received by the Nova Scotia Municipal Board May 16, 1985. Rather than further extract from this letter purporting to be the Notice of Appeal, the Board sets out the text of the letter of May 13, 1985, in full:

"COUNTRY HARBOUR HARDWOODS (1984) LTD.

R.R. No. 1, Goshen, Nova Scotia Tel: (902) 783-2173

Director of Assessment
P.O. Box 216,
Halifax, Nova Scotia
B3J 2M4.

May 13, 1985

Attention: Mr. Robert Warren

Re: Country Harbour Hardwoods
(1984) Ltd.
Acct. # 32-06131-004-000-001

Dear Mr. Warren:

Please consider this letter a formal request to appeal the decision recently by the Nova Scotia Regional Assessment Appeal Court. The company I represent is Country Harbour Hardwoods (1984) Ltd. (1600036 Ltd.) which I might add has no relation to Country Harbour Hardwoods that went into receivership in 1983.

My main reason (along with others) for the the appeal is that Market Value is reflected in the sale taking place between Industrial Estates Ltd. and the above-mentioned company. I do not feel the regional assessment appeal court fully appreciated the facts surrounding this sale and again in all fairness I feel an appeal is justified here.

Below is listed some information which may be of use to you.

Property Account Number: 32-06131-004-000-001
Assessment Appeal Number: 8532060007

If you should have any questions please do not hesitate to contact me at (902 783-2173).

Yours very truly,

COUNTRY HARBOUR HARDWOODS
(1984) LTD.

(sgd).
David N. Beeswanger
General Manager

DNB/cb
c.c.
Recorder
42 West St., Antigonish, N.S.
Attn: Mrs. V. MacEachren

Municipality of the District of
St. Mary's
P.O. Box 276, Sherbrooke, N.S.
Attn: Ms. Helen MacDonald

Nova Scotia Municipal Board
P.O. Box 1587
Halifax, N.S."

During argument of the Appeal before the Board at Sherbrooke on October 8, 1985, Counsel for the Appellant tendered a second letter, dated May 28, 1985, received by the Board on June 3, 1985, to bolster her position on the appeal and she contended that the letter should be a portion of the Notice of Appeal. Again the text of that letter is here set out in full:

"COUNTRY HARBOUR HARDWOODS (1984) LTD.

R.R. #1 Goshen, Nova Scotia Tel: (902) 783-2173

May 28, 1985

Provincial Director of Assessment
P.O. Box 216,
Halifax, Nova Scotia
B3J 2M4.

Attention: Robert F. Warren

Dear Sir:

With regards to my letter to you dated May 13, 1985 I advised you that Country Harbour Hardwoods (1984) Ltd. is appealing its 1985 Assessment, that being, Real Property Value and Business Occupancy.

For your records I would like to add some additional information as follows:

Property Account Number: 32-060131-004-000-000
Assessment Appeal Number: 85-3206-0006

Please be advised also, that Country Harbour Hardwoods (1984) Ltd. has hired a lawyer to represent its interests in this appeal.

Elizabeth (MacKay) O'Farrell
Barrister & Solicitor
P.O. Box 1422, Stellarton, N.S. B0K 1S0

If you should have any further questions, please do not hesitate to contact me at my office.

Yours very truly,

COUNTRY HARBOUR HARDWOODS
(1984) LTD.

(sgd).
David N. Beeswanger
General Manager

DNB/cb

c.c. Nova Scotia Municipal Board
Dept. of Attorney General
Recorder, Antigonish
Municipality of St. Mary's"

These two letters, taken together, are what the Appellant's solicitor contends are the Notice of Appeal herein.

The hearing before the Board commenced at Sherbrooke at 1:30 p.m. on October 8, 1985.

The subject property of the appeal, is located at Goshen, Nova Scotia, which is located within the boundaries of the Municipality of the District of St. Mary's. A decision setting the assessment of certain real property, the assessment of certain machinery, and the occupancy assessment of that real property had been made by the Antigonish, Guysborough Regional Assessment Appeal Court on March 20, 1985. The decision of that Court was mailed out (according to the backer on the Order) on April 21st or April 22nd, 1985.

At the hearing, the Board was attended by Counsel for the Director and Counsel for the Appellant. The Municipality did not appear although it had been sent a Notice of Hearing and had acknowledged the same. The Municipality also fulfilled its statutory duty of making available its Council Chambers as the space for the hearing of this Appeal.

Counsel for the Director, for the first time on the day of the hearing, questioned the Board's jurisdiction to hear the appeal on the following general grounds:

1. That the letter of May 13, 1985, was no Notice of Appeal, or, even if it was, it was merely an appeal on the question of occupancy assessment and that since occupancy assessment is merely an amount of assessment derived from a pre-arranged calculation made of the real estate assessment, no real change could flow from an occupancy assessment appeal alone and thus this appeal before the Board would be moot;

2. That the second letter, dated May 28, 1985, trying to correct that Notice of Appeal was not part of that Notice of Appeal and, in any event, was not timely;

3. That, even if grounds (1) and (2) were decided contrary to the Director's representations, the Notices of Appeal had not been served on all persons entitled to the same or, in the alternative, that the appellant had not proven service of the Notice of Appeal on all persons entitled to service thereof.

During argument before the Board, a further preliminary objection arose:

4. That there was no person before the Board who was entitled to be an Appellant within the meaning of the Assessment Act.

The Board took some evidence, and then adjourned, sine die, to consider the preceeding objections to the Board's jurisdiction to hear this appeal on its merits.

The Appellant's solicitor made representations herself, and then called David Beeswanger, R.R. No. 1 Goshen, Nova Scotia. He testified that he had commenced the original appeal before the Regional Assessment Appeal Court on behalf of the receiver of Country Harbour Hardwoods Limited and that he had prepared that Notice of Appeal and was authorized by that Company, in writing, (through its Receiver) to initiate and expedite the appeal before the Regional Assessment Appeal Court which he had commenced in March, 1985. He said the written authorization had been filed with the Judge of the Regional Assessment Appeal Court, and at the date of this hearing, the authorization had not yet been returned to the witness. Mr. Beeswanger had no copy. He said he prepared the Notice of Appeal filed with the Board in this matter and sent it to four places by prepaid registered mail. One copy of the Notice of Appeal he delivered by hand to the assessor's office in Antigonish. He said he sent a copy of the Notice of Appeal to the Nova Scotia Municipal Board, a copy to the Director of Assessment in Halifax and a copy to the Regional Assessment Appeal Court and one to the Municipality of St. Mary's.

He said he had been a Director, the Vice-President, and the on-site manager of Country Harbour Hardwoods Limited (hereinafter called Country Harbour No. 1) which commenced operations in, on or about 1980 on the subject site. He stayed in that position for about three and a half years until Country Harbour No. 1 went into receivership on March 1, 1984. Country Harbour No. 1 had an unmanageable cash flow problem. He contacted the largest secured creditor, I.E.L., and Darryl Hill was appointed receiver of Country Harbour No. 1 on behalf of I.E.L. Mr. Hill also acted for another large secured creditor, the Toronto-Dominion Bank. In turn, the witness said he had been hired by the Receiver to assist in the selling of assets of Country Harbour No. 1 and to assist in maintaining its property. In the course of his duties for the Receiver, he showed prospective purchasers around the property and he dealt with prospective purchasers of the assets of Country Harbour No. 1. On behalf of the Receiver, he attended the hearing before the Nova Scotia Regional Assessment Appeal Court. Mr. Beeswanger said he had full authority to deal with the assets of Country Harbour No. 1. The company was still in receivership in March, 1985, and, in fact, it is still in receivership. When he filed the Notice(s) of appeal for this appeal, Country Harbour No. 1 was in receivership and its assets were in the control of the Receiver. The assets of Country Harbour No. 1 were sold in June, 1985, to an Ontario numbered company. There had never been a company incorporated under the name "Country Harbour Hardwoods (1984) Ltd.". (hereinafter called Country Harbour No. 2). That company being non existent as a body corporate, could not, in any corporate capacity, acquire the assets of Country Harbour No. 1. The assets had been taken under lease to a certain numbered Ontario company "1600036 Nova Scotia Limited" (hereinafter called "Ontario No. 1"), and that "lease" was a lease with an Agreement of Purchase and Sale of many of the assets of Country Harbour No. 1. The sale provided for in the "lease" was completed to yet another Ontario numbered company "572414 Limited" (hereinafter called "Ontario No. 2"). One Philip Wynn seems to be the principal in these companies, or, at least, the person with whom this witness dealt. Under all these companies and under all these names, Mr. Beeswanger was the local manager. He filed a written authority dated August, 1985, to act for Ontario No. 2 in this appeal. He testified to preparing and signing the two letters he alleges constitute the Notice(s) of Appeal.

The Appellant filed a pre-hearing memorandum in which all the cases cited were photostatically reproduced. The Director's solicitor filed one pre-hearing memorandum dealing with the merits of the case, and another memorandum after the hearing, which dealt with the jurisdictional issues before the Board and which also had photostatic copies of all cases cited. No preliminary conferences of any sort were sought or held, and the Board did not have any notice, or even any indication, that there would be preliminary objections taken. As far as the evidence before the Board shows, there was no indication given by the Director to the Solicitor for the Appellant that any preliminary objections would be taken, or the grounds on which those objections would be taken.

The evidence clearly shows that the person who signed the Notice (or Notices) of Appeal, David N. Beeswanger, throughout the time leading up to this appeal hearing was acting only as an agent. The persons who, under Section 100(2) and 100(3), are entitled to appeal the decision of the Regional Assessment Appeal Court to this Board did not appeal. Therefore, for there to be an appeal on the merits in this case, the Appellant must fit himself within the definition of "any person aggrieved by a decision of the Regional Assessment Appeal Court..." as set out in Section 100(1) of the Assessment Act which we will now quote in full:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

As it has already been said Mr. Beeswanger was not a principal. He signed and used the letterhead of "Country Harbour Hardwoods (1984) Ltd." and he signed as its general manager. In fact, the evidence showed that Country Harbour No. 2 was not a body corporate, was never free to use that name [which was the property of Country Harbour No. 1, in receivership a former owner, and perhaps, still the assessed owner of the property in question.] Ontario No. 1 was in occupation (under a lease and agreement to buy) of the subject lands and equipment until the lands and equipment were sold in June, 1985, by Country Harbour No. 1, in receivership, to Ontario No. 2.

The evidence shows that the assessed owner at the time the appeal process was commenced was Country Harbour No. 1. There is no evidence to show whether the assessment roll was ever changed following the change in ownership. The Board is free to conclude from the evidence that Country Harbour No. 1, being in receivership and having sold whatever interest it had in the subject lands and equipment may not still be "a person aggrieved" since it may not suffer possible loss or possible gain from the eventual disposition of this appeal were the appeal to be heard on its merits. Country Harbour No. 1 had David Beeswanger as one of its authorized agents throughout, but Country Harbour No. 1 is clearly, and expressly, not the signatory Appellant. "The Company I represent is Country Harbour Hardwoods (1984) Ltd. (1600036 Ltd.) which I might add has no relation to Country Harbour Hardwoods that went into receivership in 1983." The Board cannot ignore this express disclaimer emanating from the one person who is conversant with all the bodies mentioned here or, at least, ought to be so conversant. He is in the position to know. Country Harbour No. 1 is not the Appellant.

Since it might be argued that Ontario No. 1 signed the Notice of Appeal, could Ontario No. 1 be an aggrieved person?

Up until June, 1985, it was apparently a tenant in occupation of the subject land and equipment and the appeal commenced (if it did) in May, 1985. It was also, at that time, a purchaser under a lease and agreement of sale (the agreement of sale not having been tendered to this hearing). On the evidence at the time of this hearing, Ontario No. 1 no longer has any interest in either land or equipment since it is neither an assessed owner nor an actual owner of any property subject to this appeal. Its interests now are moot and it did not, on balance and in its own name, sign any notice of appeal. Ontario No. 1 is a person, but it is not an aggrieved person within the meaning of Section 100(1) of the Assessment Act. It can suffer no harm or receive no benefit from the disposition of this appeal on its valuation merits.

Ontario No. 2, on the evidence, could be now an aggrieved person. Ontario No. 2 has not signed any Notice of Appeal in its own name or in any other name. Country Harbour No. 2 does not exist as a separate independent entity as a limited company. It is an apparent partnership (sole proprietorship, if you like) as defined by the Partnerships and Business Registration Act. For the purposes of this appeal, and the Notice of Appeal, Ontario No. 1 might be "in partnership" as defined under Section 1(a) of that Act which says in part:

> "...the word partnership includes a person who is engaged in business...for the purpose of gain and is not associated in business with any other person, but uses in his style in connection therewith some name or designation other than his own name...with the addition of...some words or phrases indicating a plurality of person."

If Ontario No. 2 were such a person carrying on business under the firm name and style of "Country Harbour Hardwoods (1984) Ltd." (as the evidence seems to indicate), was Ontario No. 2 a person capable of mounting this assessment appeal in Nova Scotia? Section 2(1) of the Partnerships and Business Registration Act prohibits any partner from carrying out in Nova Scotia the partnership objects without registration. Inter alia, this prohibits Ontario No. 2 from carrying out an assessment appeal in Nova Scotia without registration. The evidence is clear that there was no such registration. The evidence is also clear that the name used by Ontario No. 2 at any time relevant to this appeal, must be rejected since the name used was the property of Country Harbour No. 1 and the use of the name was contrary to the provisions of Section 3(2) of the Partnerships and Business Registration Act. The use of the word "Limited" in Country Harbour No. 2's name is also a prohibited use of name in Nova Scotia for reasons set out by Sections 68 and 69 of the Companies Act. Under Section 18 of the Partnerships and Business Registration Act, the appeal by an unregistered partnership would be an illegality. The Board cannot recognize such illegal actions by granting status to the partnership of Ontario No. 2 in Country Harbour No. 2 or any other combination of "Ontario" and "Country Harbour". All these combinations are unregistered under the Partnerships and Business Registration Act, and violate the Companies Act: There is a dual illegality here. Ontario No. 2 does not, by any stretch of the imagination, show up on the Notices of

Appeal. Thus none of the persons mentioned in the evidence as having to do with the assessment and/or occupation and/or ownership of the subject property at any relevant time hereto and who have sought to bring this appeal forward before this Board exist as a person, who has signed a Notice of Appeal, or otherwise than as an illegal "partnership". There is, thus, no Appellant. As there is no Appellant, it follows there can be, by all logic, no person aggrieved by the decision of the Regional Assessment Appeal Court who has signed and filed a timely Notice of Appeal within the meaning of Section 100(1) of the Assessment Act. Therefore this appeal will be dismissed. For the purposes of this part of the decision, it makes no difference whether the Board adopts the letter of May 13, 1985, as the only timely Notice of Appeal, or whether it adopts both the letters as constituting the Notice of Appeal, the appeal would fail in any event.

During the argument on the appeal, the Board verbally indicated that it thought a presumption of legality would (in the absence of proof of the delivery of the decision of the Regional Assessment Appeal Court to the Appellant), allow the Board to deduce that the dates of receipt by the Board of the letters dated May 13th and May 28th, were timely, i.e. within thirty days of the delivery to the Appellant of the decisions appealed from. As stated before, the Regional Assessment Appeal Court's decisions were filed on April 21, 1982, and mailed to someone on or about that date. Notice(s) of Appeal were dated on May 13th and May 28th and were both received by the Board. As to the matter of time, supra, the Board, cannot remove from the Appellant its burden of proving its appeal was timely. Any presumption of legality does not apply in this case. The presumption of legality, is an evidentiary crutch which becomes available only when a governmental official has a statutory duty to perform and, when it is shown he performed that duty, it is presumed that the duty was performed legally until the contrary is shown. Here the Appellant is not a government official and has no statutory duty to perform. It is, at best, a taxpayer Appellant with a right to appeal which expires with time. That right to appeal gives it the burden of filing, within time, a Notice of Appeal from a decision of a Regional Assessment Appeal Court. In order to succeed here (timewise), it should be able to prove:

1. The decision of the Regional Assessment Appeal Court;
2. The date of the receipt by it of the decision of the Regional Assessment Appeal Court;
3. The timely delivery of the Notice of Appeal to the persons entitled thereto.

Having done all these things, the Appellant then has the burden to adduce the evidence to prove to the Board that it has done all these things at the hearing. It must prove the date of the decision of the Regional Assessment Appeal Court. It must prove the time that it received that decision. It must prove it has served the Notice of Appeal on the persons entitled to within the time limited therefor. The Appellant here has not proven that it has served its Notice of Appeal within time. The decision was made on March 22, 1985, and it was received between April 22, 1985, and May 13, 1985 (inclusive). It was clearly shown to be in the hands of Mr. Beeswanger for the Appellant by May 13, 1985 since that was the date that Mr. Beeswanger dictated the first letter or Notice of Appeal and Mr. Beeswanger must have received a copy of the decision appealed from on or before that date. It is clear that the letter of May 13, 1985, would have been filed in time with the Board since the receipt by the Appellant of the decision of the Regional Assessment Appeal Court could not have been before April 21, 1985, and the two dates are less than 30 days apart. The letter of May 28th may not have been so timely, since it may have been out of time completely, depending on the date of the receipt by the Appellant of the decisions appealed from. In any event, there is a "window of appeal" as to time which finally closed May 13, 1985, at the latest and may have been triggered by the date, April 21, 1985, at the earliest. In any event, the appeal time had, by the time of this hearing, now expired so that no further Notice of Appeal can be made concerning the decisions complained of.

Given the total number of days that exist in that "window of appeal" and given an equal chance to each day within that window as a delivery date, a mechanical calculation would show that, statistically, to a balance of probabilities, the Notice was delivered for both letters within the "window of appeal". Because of the numerous unknowns, delivery time of mail, office procedure of the Appellant, office procedure of others, the Board is unable to apply the statistical approach in arriving at a delivery date of the decision appealed from such a calculation of a balance of probabilities.

The Appellant has said that it "served" the various parties herein referred to by mail. The Board here lists the parties it is required to serve:

1. The Recorder. It mailed a Notice of Appeal to the Recorder and it has no proof that this mail was received by any person and where and when;

2. The Clerk of the Municipality. It has no proof that such a person was served although it mailed a copy of the Notice of Appeal to the Municipality of the District of St. Mary's, attention Mrs. Helen MacDonald. The date of receipt of this letter is not shown and there is no evidence to show that Mrs. Helen MacDonald is in fact the Clerk. The Municipality of the District of St. Mary's did not attend at the hearing and was not represented thereat. The Municipality of the District of St. Mary's had prepared and had made available the site for the hearing. These arrangements were made at the request of the Board after the appeal time had expired.

3. The person in whose name the property was assessed. The evidence (which was not precise on this point) indicated that Country Harbour No. 1 was at all times material to this appeal to a balance of probabilities the assessed owner of the subject land and equipment. The Appellant before the Board was not Country Harbour No. 1. No notice of Appeal

was served on Country Harbour No. 1. Mr. Beeswanger, however, proved his agency to act in assessment appeal matters for Country Harbour No. 1 and thus any Notice of Appeal signed by him would ipso facto then have been, at the time of signature because of the agency, deemed to have been delivered to Country Harbour No. 1 and therefore the assessed owner, Country Harbour No. 1, was given a Notice of Appeal.

4. The Clerk of the Nova Scotia Municipal Board was mailed both Notices of Appeal and acknowledged delivery of the letter of May 13, 1985, on May 14, 1985, and the letter of May 28, 1985, on June 3, 1985, thus the Notice(s) of Appeal was filed with the Nova Scotia Municipal Board.

Begging the question of timeliness, it is clear that the Appellant accomplished the filing of the Notice of Appeal with the Nova Scotia Municipal Board.

Begging the same question, it is clear that the Director of Assessment was served since his representative, attending the hearing, acknowledged the service.

Begging the same question, the Clerk of the Municipality was not proved to have been served. Neither the Clerk nor the Municipality has acknowledged service. Service on the Clerk of the Municipality was attempted by mail. In the absence of an acknowledgement of service, some proof of service is required. The best proof of service would, of course, be proven personal service on the Clerk. Counsel for the Appellant has cited various sections of the Assessment Act allowing for service by mail. Service by mail here, of course, is allowed but there is no deeming section which says that service by mail will be effective in the absence of proof of delivery, the Appellant was not able to prove delivery and thus has not proven service, at all, on the Clerk of the Municipality.

5. Whether or not in this appeal there is a "person in whose name the property is assessed if he is not that party", the Board is satisfied, despite argument made to the contrary, that David Beeswanger at all times relevant to this appeal before the Board was authorized agent of Country Harbour No. 1, Country Harbour No. 2 (to the extent it existed), Ontario No. 1 and Ontario No. 2 concerning assessment matters, at least, and thus his signature and signing of Notices of Appeal would be service on all of the above who were not already appellants and if they were the assessed owners. The same reasoning governs the service of Notices of Hearing.

Counsel for the Appellant stated at page 6 of her Memorandum "It is apparent from the decision of the Regional Assessment Appeal Court that no issue was taken on the status of the Appellant". This is correct in fact but, in the view of the Board, irrelevant. The express or implied finding by the Regional Assessment Appeal Court made as to status of the Appellant before it is not open to question before this Board and, conversely, that finding is not binding in any way upon this Board since this hearing is an appeal de novo. The fact of the existence of a decision of the Regional Assessment Appeal Court is a link in the assessment chain necessary to give the Board jurisdiction. Once the existence of the decision of the Regional Assessment Appeal Court is proven, the Board has no further power or duty to interpret it (see Re: Spiropoulous 1983, M.B.D., Vol. 2, page 173) which says in its headnote:

> "The Appellant argued that the decision of the Regional Assessment Appeal Court was null and void. The Board held that that decision remained valid until such time as someone with proper authority declares the decision void and the proper authority to do this...is not the Municipal Board."

In Spiropoulous, supra; in Grono v. Virick (1983), M.B.D. Vol. 2, page 71; in Re: Pioneer Projects (1983) M.B.D. Vol. 2, page 81; in Re: Misty Moon (1983) M.B.D. Vol 2, page 99; in Re: MacKinnon (1983) M.B.D. Vol 2, page 199, in all these cases which the Director's counsel cited to support his argument re the consequences of failing to serve an essential party, the Director had taken the trouble to contact the opposite parties and to adduce evidence, affidavit or otherwise, demonstrating the non-service. In Re: Grono, supra, the Director adduced affidavit evidence intended "to prove there had been no service of the Notice of Appeal on the City Clerk and on the Director of Assessment". In Re: Pioneer Projects Limited, supra, the Appellants' viva voce evidence, obtained on cross-examination by counsel for the Director, showed neither the Recorder of the Regional Assessment Appeal Court, nor the Clerk of the Municipality were served with a Notice of Appeal. In Re: Misty Moon, Supra, affidavits were filed by the Director proving non-service on the Director and on the Recorder. The Director's solicitor, as well, before the Board called the hearing to order, had sent out a letter stating the Director's preliminary objection to the Board and to the opposing party.

In Re: MacKinnon, supra, the Director had, by pre-hearing letter to the Appellant, noted his preliminary objection to the appellant in that case. In Re: MacKinnon, viva voce evidence was given on behalf of the Director to show non-service on the Recorder.

In all these cited cases (cited in the present case at the voluntary instance of the counsel for the Director), the Director had followed a practice of giving Notice of any preliminary objection to the other side. In each case, he had followed a practice (which this Board commends) of actively proving non-service on some of the parties. The parties not having been served were governmental parties of one kind or another and knowledge of their non-service would have been easily obtainable by the Director.

No preliminary notice of objections were given in this appeal to the Board, and there is no evidence that any objections were raised in a preliminary correspondence with the Appellant or its counsel. The Counsel for the Director chose to bring no viva voce evidence to the hearing to disprove actual service on the various persons required to be served under the provisions of Section 100(1) of the Assessment Act. The list of cases cited by the Counsel for the Director shows a practice which draws approval of the Board in that they indicate a fair method of the handling of jurisdictional objections between governmental litigants and taxpaying litigants by solicitors for the governmental litigants. The question now is whether the Director was required to give a preliminary notice of objection to jurisdiction to the other parties and whether he had to adduce evidence of non-service in order to succeed in his objections to jurisdiction? It is clear, and unfortunate for the Appellant taxpayer, that the answers to the immediately preceeding questions are "No".

In this appeal, in light of the evidence adduced by the Appellant, such a notice of preliminary objection as in the cases cited might have persuaded the Appellant from proceeding further in a futile appeal. As it was, both the Board and the Appellant came to the hearing of this appeal expecting to hear the appeal on its valuation merits. In this Appeal, the Director is not without fault when blame is apportioned to those responsible for the futility of preparing for an unnecessary appeal hearing.

CONCLUSION:

The Board's findings are, in summary, as follows:

1. The Appellant is an "unregistered partnership or an unregistered sole proprietorship" within the meaning of the Business and Partnership Registration Act consisting of Ontario No. 1 carrying on business under the firm name and style of "Country Harbour Hardwoods (1984) Limited, a sole proprietorship," which is illegal under that statute and also under the Companies Act for the reasons previously stated and therefore is not entitled to recognition by this Board as a "person" under the phrase "any person

aggrieved" within the meaning of Section 100(1) of the Assessment Act.

2. The assessed owner of the subject lands, plant and machinery is Country Harbour No. 1 to the balance of probabilities on the evidence before the Board.

3. The actual owner of the subject lands, plant and machinery, as of the date of this hearing of this appeal, is Ontario No. 2.

4. The common agency of David W. Beeswanger ensured notification or delivery of the Notice(s) of Appeal (whichever it was) to Country Harbour No. 1, Country Harbour No. 2 (to the extent it exists), Ontario No. 1, and Ontario No. 2. Those persons received Notices of Hearing and Notices of Appeal.

5. The decisions of the Regional Assessment Appeal Court were delivered to Beeswanger (and thus to Country Harbour No. 1 and Country Harbour No. 2, Ontario No. 1 and Ontario No. 2,) on or before May 14, 1985, and on or after April 21, 1985, and the date of delivery of the decisions, on the evidence before this Board, can be set with no finer precision.

6. In view of the dismissal of the appeal on other grounds, the Board declines to find whether the Notice of Appeal was one or both of the letters cited and declines further to

make a finding of whether or not the Notices, either or both of them, were adequate and timely.

7. The Clerk of the Municipality of St. Mary's was not proven to have been served by the Appellant within the time required and the appeal fails on that ground.

8. Proof was lacking concerning the service on the Recorder.

These lacunae of service could easily have been noted by the Director within the practice set out in the cases cited above and then dealt with by preliminary correspondence between counsel. The appeal then could have been disposed of by agreement between the parties, and, failing that, by a hearing on the jurisdictional issues alone at the time set for the appeal. In addition, the Board would have prepared itself to deal with the jurisdictional objections, only, had it been notified in advance of the hearing, of these preliminary matters.

The appeal must here be dismissed on two grounds:

1. There is "no person aggrieved" before the Board; and

2. The Notice of Appeal has not been served on one or more parties required to have been served, namely the Clerk of the Municipality and the Recorder of the Regional Assessment Appeal Court.

The Director chose to refrain from adducing positive proof of non-service (although all the cases he cited showed that it was the practice of the Director to adduce such evidence). He decided not to give any person notice of his preliminary objections (again contrary to the practice in the cases cited by him). On the other hand, the Counsel for the Appellant appeared not to have determined, in terms of the Assessment Act under which she was appealing, who her client was before the time of the hearing. She did not look beyond Mr. Beeswanger. She should have. Thus she also helped in setting up the situation resulting in the unnecessary preparation for holding a hearing.

In the result, the appeal will be dismissed for lack of jurisdiction of the Board to hear the appeal for the reasons outlined above without costs to any party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of January, A.D., 1986.

RICHARD L. WELDON, Member
NOVA SCOTIA MUNICIPAL BOARD.

Cummings v. Director of Assessment

ASSESSMENT--RESIDENTIAL--HEARING PROCESS--JURISDICTION--FAILURE TO NOTIFY CO-OWNERS--VALUATION--INCOME, MARKET DATA, COST APPROACHES--SELECTION OF COMPARABLES FOR MARKET DATA APPROACH--ASSESSMENT ACT, SS. 31, 33(1),(2),(3),(4), 38, 66(3), 77(2),(3), 86(1),(2),(3), 89(1)(a), 91(1)(b), 94, 98(2), 99, 100(1),(2),(3), 101--MUNICIPAL BOARD ACT, SS. 4, 25, 27(1),(2),(4), 45

This is an appeal from decisions of the Halifax City Regional Assessment Appeal Court respecting four residential properties. The Board does not permit new evidence or facts to be submitted through a brief. These must be presented under oath and subject to cross-examination and rebuttal in an open hearing. In relation to one of the properties (1684 Walnut St.), there were co-owners with the Appellant who received no notice and appear to have had no knowledge of the appeal of their assessment. The Appellant alleged a trust agreement between himself and the other co-owners, but the Board will not consider this agreement filed after the conclusion of the evidentiary portion of the hearing as it was then inadmissible evidence.

HELD: The Board has no jurisdiction to hear the appeal on 1684 Walnut St. On the other three properties, the appeals are allowed in part. The Appellant will have $100 in costs to assist in the cost of employing a reader (the Appellant had very poor eyesight).

Because of the failure of the Appellant to serve Notices of Appeal on other persons in whose name 1684 Walnut St. is assessed, the Board has no jurisdiction to hear the Walnut St. appeal. Section 33(4) of the Assessment Act does not assist the Appellant as the alleged agency or exercise of control required has not been proven. On the question of valuation of the first Fenwick St. property, the parties agreed that an indirect approach was a necessary tool and preferred to use the market data approach. There was no evidence of income. The Board accepts the market data approach. The burden is on the Appellant to show the properties selected by him as comparables were superior to those of the assessor as indicators of market value. The Appellant has not discharged that burden. The assessor's calculation should, however, be adjusted to reflect depreciation for fixtures in the gutted portion of the lower flat and the absence of a driveway. With respect to the South Park St. property, again there was no evidence of income to allow the use of the income data approach. The Director seeks to add another $6,000.00 to the assessment of this property. Again the market data approach using recent sales of comparable properties is employed. There was evidence of a policy of the Director of reducing the assessments of multiple units in Halifax by 15%. Also, the level of assessment in Halifax is running about 10% less than the market value of the properties. The Appellant is to have the benefit of these facts. One property reviewed for market data is so comparable that the Board sets the assessment for the South Park St. property as the same as the assessment for the comparable. With respect to the second Fenwick St. property, again the indirect sales approach is used. The Appellant has brought insufficient evidence to discharge his burden to persuade the Board to reduce the assessed value. With repect to 1684 Walnut St., while the Board has found it has no jurisdiction, it will express an opinion on valuation. If the Board had jurisdiction it would have accepted the assessor's valuation less the amount of $8,500.00 to bring the property up to average condition.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by an Appellant, **DONALD J. CUMMINGS** from decisions of the Halifax City Assessment Region Regional Assessment Appeal Court, dated January 24, 1984, respecting the 1984 assessments of four residential properties in the City of Halifax.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: DONALD J. CUMMINGS, Acting on his own behalf;

RANDALL DUPLAK, LL.B., for the Director of Assessment.

DECISION

This is an assessment appeal made by an Appellant, **DONALD J. CUMMINGS** from decisions dated January 24, 1984, of the Halifax Regional Assessment Appeal Court on one Notice of Appeal dated April 1, 1984, for several assessments for the assessment year 1984, of the following properties:

PROPERTIES	ASSESSMENT SET BY REGIONAL ASSESSMENT APPEAL COURT
A. 5651 - 53 Fenwick Street, Halifax;	$ 80,300.00
B. 1289 South Park Street, Halifax;	$138,000.00
C. 5649 Fenwick Street, Halifax;	$ 87,700.00
D. 1684 Walnut Street,	

Halifax; $ 94,300.00

There are two facts in light of the subsequent body of this decision which the Board stresses by mentioning them in the opening phase of its decision:

1. The Appellant, Donald J. Cummings, has very poor eyesight;

2. The Director circulated his expert's reports on the Friday afternoon before a scheduled Monday morning hearing.

All subsequent remarks of the Board in this decision should be read as if these two thoughts were written into each finding hereinafter made.

GENERAL BOARD PROCEDURE

Both parties filed briefs and from the general text of the Appellant's brief it is clear that the Appellant, despite advice of the Director's Solicitor and, indeed, despite advice of the Board itself, may have misunderstood the directions of the Board concerning the briefs and how the Board uses briefs in arriving at a decision. On page one of his brief, Mr. Duplak voices a concern:

> "It was not my understanding that the purposes of the brief to be filed by the Appellant...was to provide him with an opportunity to introduce new evidence in the matter."

Exactly!

Since there may have been a misunderstanding on the part of the Appellant, an analysis of the Board's process may be in order.

An inferior tribunal, the Board must still proceed in accord with the general principles of natural justice and "fairness". In the context of this appeal, that means:

1. The case must be decided by the Board on evidence properly admitted before the Board.

2. The evidence properly before the Board must be that evidence which has been introduced by a party at an open hearing on the record by and through a witness available to be cross-examined on his evidence by the opposing party.

3. The briefs called for were merely for comment upon, items (1) and (2) above (and suggestions for legal conclusions to be drawn from the facts) and were not opportunities to adduce new evidence of any nature - not to say that the new evidence might not be relevant or not to say that such new evidence might even be true. Such late evidence has not been tested, as is required by our legal system, in the crucible of an open on the record hearing before an impartial adjudicator, and has not been subjected to the acid test of cross-examination and/or the antidote of rebuttal.

Thus, our legal system deals not in ideal solutions but in finite ones. A day, place and a time is set for the hearing. All parties are required to be ready at that time, place and day. The person initiating the proceedings has a burden to adduce evidence, at least to commence with, and the process continues under varying rules until finished on the record, under oath, before an unpredetermined but finite time. It is a case of "now or never" for evidence. Each party has ample opportunity to adduce evidence until he signifies he has no more (or in extreme cases when, in fact, the adjudicator finds that he has no more): When all parties are finished, the evidence-taking aspect of the hearing is closed. Argument on that evidence proceeds and a decision based on the applicable law and that evidence, and that evidence alone, leads to a decision. The ability to adduce evidence ceases when the evidence portion of the hearing is concluded. The parties' positive input ceases when they have finished their arguments, and the decision maker retires to contemplate the evidence, to digest the argument, and to arrive at his decision. The decision maker can only contemplate the specific pieces of evidence put before him. His only assistance in considering the evidence is his legal knowledge, if any, (which may be assisted by the briefs) and by his ability to make findings of facts and to interpret the evidence in accordance with the law.

There is no room in the system for a party, having had ample time to prepare, to call more evidence once his evidence has closed. If, while a hearing is underway, a party sees the need to call evidence other than he has presently available, he is free to request an adjournment which may or may not be granted. That is not the case here. At the Board's initiation during the hearings, adjournment was mentioned as a possibility on more than one occasion. Despite such mentions, no request for adjournment was ever made by the Appellant; adjournment is not an issue here.

This appeal and, the Board hopes, all other cases in our legal system, will be decided by an impartial adjudicator in accordance with the applicable law upon relevant admitted evidence made upon the record in the manner set out summarily above.

SERVICE OF DOCUMENTS PRELIMINARY TO HEARING OF APPEALS

All parties before the Board agreed (with the exception of property "D" supra being 1684 Walnut Street) that all necessary jurisdictional elements respecting properties (A) to (C) inclusive had been proved and all necessary services had been appropriately done and that the Board had jurisdiction to hear appeals relating to those properties on the merits, which jurisdiction the Board adopts.

D. SERVICE OF DOCUMENTS PRELIMINARY TO THE HEARING OF APPEAL 1684 WALNUT STREET

Mr. Duplak, on behalf of the Director, made argument that the Board had no jurisdiction to hear the appeal relating to 1684 Walnut Street and because of this lack of jurisdiction this Board has no power to either lower the assessment (as requested by Donald Cummings) or to increase the assessment as requested by the Director.

Donald Cummings had filed one Notice of Appeal respecting four different properties including 1684 Walnut Street. The following is the full text of the Notice of Appeal:

"Donald J. Cummings
1684 Walnut Street
Halifax, N.S. B3H 3S4

August 14, 1984

Clerk, Nova Scotia Municipal Board
P.O. Box 1587
Halifax, Nova Scotia
B3J 2Y3

NOTICE OF APPEAL FROM DECISIONS OF THE HALIFAX CITY REGIONAL ASSESSMENT APPEAL COURT, as follows:

Appeal #84-01-1995, 5651-53 Fenwick St.
57-012169-000-000-000
Appeal #84-01-1933, 1289 South Park St.
57-015288-000-000-000
Appeal #84-01-1992, 5649 Fenwick St.
57-012167-000-000-000
Appeal #84-02-1994, 1684 Walnut St.
57-026763-000-000-000

Dear Sir or Madam:

Please take notice that I wish to appeal to the Nova Scotia Municipal Board the decisions of the Halifax City Regional Assessment Appeal Court referred to above.

My grounds for appeal are that the Assessment Appeal Court did not give proper weight to evidence for the above properties which are out of line with other similar properties referred to by me during the hearings.

Specifically, the Chairman of the Court did not give sufficient consideration to the deteriorated condition of the two Fenwick Street properties (one flat completely gutted out), and did not give sufficient consideration to comparisons with similar lower-assessed properties at all three locations. Also serious objection is taken by me to the fact that two different procedures are employed by the assessors in arriving at real market value for revenue properties, namely a procedure which determines values for properties of four units or more based on revenue produced by the property, but determines values for properties of three units or less on the basis of replacement cost less depreciation. Furthermore objection is taken to the practice of assessors in making a 15% reduction in the assessed value of properties simply because they contain more than one unit. It is my contention that these practices lead to serious inequities in assessed values of similar properties.

Yours sincerely,

(Sgd.) Donald J. Cummings

Copies to:
Regional Director of Assessment,
   Halifax City Assessment Region
Recorder, halifax City Assessment Region
Clerk, City of Halifax."

Mr. Duplak conceded that the Board and the Director received the Notice of Appeal in time. He however contended that there were many other assessed owners of 1684 Walnut Street that they had neither signed the Notice of Appeal nor had been served a copy of the Notice of Appeal nor the Notice of Hearing and therefore the Board had no jurisdiction to proceed further with this appeal or the Director's request to have the assessment increased. In a preliminary manner, the Board decided to hear evidence (seeing that the appeal procedures had been perfected for properties (A) to (C) inclusive) and to clear up this jurisdictional issue during the process.

Under oath, Mr. Cummings stated that his Notice of Appeal had been served on all persons named on it either by himself or by his sister within an hour from the time he started serving the Notices of Appeal. He first swore that he didn't serve the Recorder of the City of Halifax Assessment Region Regional Assessment Appeal Court and he went on to say that he didn't serve any of the other assessed owners of 1684 Walnut Street. He said that he was the owner of 1684 Walnut Street. He said that he was acting on behalf of himself and all the other assessed owners. In a contradictory manner, he went on to say that, in relation to 1684 Walnut Street, he was not sure if every one of the other assessed owners of that property knew of the appeal. He said he had a trustee document (which he didn't produce) which authorized him to act for all the other assessed owners. He said that at least one of his sisters, being one of his co-owners (or perhaps even two of them), didn't know of his initiation and his prosecution of this appeal. Debi Karrel, the then Clerk of the Board, said at the hearing that she had served the Notice of Hearing on the persons listed in her correspondence but had not served any of the assessed owners of the properties listed in the Notice of Appeal except Mr. Donald Cummings. Thus it is very clear from the evidence that there is a great deal of ambiguity as to whether all the other owners of 1684 Walnut Street, were aware of the appeal, the date of the hearing of the appeal and whether they had authorized it. The Board finds as a matter of fact that Mr. Cummings did not prove his alleged power to act on behalf of the other assessed owners by means of the alleged trustee document which was not adduced in evidence at the hearing. It finds that the Notice of Hearing did not go to all of the other assessed owners. In an assessment appeal, there is no requirement for the publication in a newspaper of the Notice of Hearing. The Notice of Appeal was signed by Mr. Cummings and it did not set out therein any representative capacity either for himself or for anybody else. The Board finds that at least one of the other co-owners, and perhaps more, did not receive a copy of his Notice of Appeal. According to the evidence before the Board, the other assessed owners were Barbara, Margaret, Ruth and Joan Cummings.

Since the Notice of Appeal had been properly served with respect to three of the four properties involved, this particular jurisdictional issue respecting 1684 Walnut Street was reserved by the Board and evidence was adduced as if the service of all necessary documents on all necessary parties had been properly made.

Mr. Cummings made the statement that he was acting for himself before the Board, and for all other assessed owners. He further stated that he was entitled to act under some sort of will or trust document on all matters concerning 1684 Walnut Street and that he had, in any event, express authority to act for all other assessed owners. Had the matter rested there and had that been the truth of the matter, it probably was enough to satisfy the Board that all the other assessed owners had received notification of commencement of proceedings and Notice of Hearing, at least through an agent. Still under oath, Mr. Cummings, however, went on to say that he was just one owner with all the other owners named and that he had sent none of them Notices of Hearing, that he had given some one of them Notices of Hearing to deliver but no notification of commencement of proceedings to any of them. He did not ask for an adjournment of the proceedings in order to allow him to obtain consent from the other owners or to serve Notices of Hearing although on more than one occasion the Board had mentioned adjournment. He chose not to adduce the "trust" instrument he referred to. With all deference to his legal skill, the Board cannot, and will not, accept his interpretation of the alleged document but must insist that the document itself be produced before trying to interpret it. In the absence of the document or supporting documents, the Board dismisses, or finds inadmissible, his recounting of the contents of that alleged document, its existence, and what would be its legal effect. The document concerned may do as Donald Cummings says it does. It may not. If he wishes to rely on the alleged document to build footings for his appeal he must prove it in the time and place allowed for such proof. He had chosen not to do so, thus his appeal gets no credence from the alleged document. And as far as the Board is concerned, there is no admissible evidence concerning that alleged document or, if the Board is wrong in so finding, the evidence of the document is so insubstantial as to have no evidentiary and probative value on which to solidify or build foundations for this appeal. From his evidence, the Board determines that one or more of the assessed owners had:

1. Not authorized the appeal;
2. Received no notification, in fact, of the commencement of the proceedings;
3. Received no Notice of Hearing.

On the other hand, the evidence showed that Mr. Cummings himself was one of the assessed owners. He had commenced the appeal by signing the Notice of Appeal and he had received the Notice of Hearing from the Board and he says, uncontradicted, that he knew of all the relevant dates. These findings indicate that one or more of the assessed owners of 1684 Walnut Street did not authorize the appeal, that one or more of them did not receive the Notice of Hearing and that one or more of them did not receive notification of the commencement of the proceedings. Section 27(2) of the Municipal Board Act requires that all parties shall receive these notices and notifications. Section 77(2) of the Assessment Act allows a ratepayer to appeal another person's assessment. Section 77(3) says any person who has an interest in a property may give notice to the Recorder and to the person assessed for the property that he appeals the valuation or classification of the property. Under Section 86(1) of the Assessment Act, the Recorder shall serve the Appellant and the assessed owners of the property

Notice of Hearing. The above sections deal essentially with appeals to the Regional Assessment Appeal Court. Section 99 of the Assessment Act allows an appeal to this Board. A person aggrieved by a Regional Assessment Appeal Court decision may appeal by serving a Notice of Appeal within thirty days on the following persons:

1. The Recorder;
2. The Clerk of the Municipality;
3. The Director;
4. The person(s) in whose name the property is assessed if he is not that person; and by filing a copy of the Notice of Appeal with the Board; and not otherwise.

These are all required by Section 100(1) of the Assessment Act. In addition, under Section 27(2) of the Municipal Board Act notification of the commencement of proceedings must be given to the parties to the proceedings as defined in Section 27(1). Parties include: (a) the Applicant or Appellant; (b) the person responsible for the decision or act that is appealed; (c) any municipality...that may be affected; and (d) the Minister of Municipal Affairs.

In any event, Mr. Cummings did not serve Notice of the Appeal on at least one of the other assessed owners. This is not a correctable error so no appeal can lie in respect of the other assessed owners of 1684 Walnut Street unless they have been served Notice of Appeal by means of some constructive or deemed service. Such constructive or deemed service can only be authorized under some statute since service, in fact, did not take place and authority to appeal, in fact, had not been given to Mr. Cummings by all the other assessed owners. Could Donald Cummings succeed in appealing and having the merits heard on this appeal based on his interest in the lands alone? He is an appropriate Appellant (Section 66(3) of the Assessment Act), but he must give notice to all other assessed owners. Section 31 of the Assessment Act allows the assessor (as he has done in this case), to assess the property as a unit to all the co-owners without breaking the assessment down to the respective units of ownership. By assessing pursuant to this section, the Assessor has so dealt with the assessment of 1684 Walnut Street that the interest in the property of Mr. Donald Cummings is not separately identifiable, not separately valued for assessment purposes, and therefore not appealable by Mr. Donald Cummings alone in itself. The whole of the assessment must be appealed as a unit, the value of the whole of the assessed property must be dealt with on such an appeal and notice of appeal must be given to all assessed owners of the property appealed.

Section 33(4) of the Assessment Act, however, may be some help to Mr. Cummings in this matter. It says, in essence, if there is more than one person exercising control of property...it shall not be necessary to serve all of them...with any of the Notices required to be given by the Act but Notice given to one of them shall be deemed to be a Notice given to them all.

If Donald Cummings was acting for himself and for all the present assessed owners of the land, then, of course, his express authority would give him the chance to initiate and prosecute this appeal and the Notice to himself in every case would in fact be Notice of Hearing, Notice of Commencement of Proceedings and Notice of Appeal to himself and to all other assessed owners. The Board has found as a fact that he was not exercising full control and was not authorized to initiate and prosecute this appeal by all the other assessed owners. Section 31(4) of the Assessment Act may have been intended to deal with that situation and the Notice of Appeal (which is ipso facto, a notification of commencement of proceedings) and the Notice of Hearing were all the notices required to be given. Section 33(4) of the Assessment Act was primarily directed to other types of Notices but the Section does deal with the representatives of multiple assessed ownerships and therefore could have been relevant to this appeal. Section 33(4) provides that "if there is...more than one person exercising control...it should not be necessary to serve all of them...with any other Notice required to be given by this Act; but Notice given to any of them shall be deemed to be Notice given to all of them."

If the Board could rely on Section 33(4) of the Assessment Act to allow service of the Notice of Appeal under Section 100(1) of the Assessment Act on the other person or persons in whose name the property is assessed, then it must say that the Appellant's Notice of Appeal prepared and signed by himself was in fact served on himself upon his signature and was effectively served upon all his co-assessed owners as of the time of his signature.

The Board would be less hesitant in making such an interpretation if the net effect of the appeal on the merits could only be:

1. A confirmation of the existing assessment; or
2. A reduction of the existing assessment.

Counsel for the Director however alleges that, even in the case of the absence of a cross-appeal by the Director, there could be, as a result of an appeal on the merits, an increase in the assessment. If, in this appeal, his objection to jurisdiction fails and the appeal is heard on its merits, the Director is seeking such an increase. In so arguing, he cites Section 101 of the Assessment Act, particularly Section 101(2); Section 89(1)(a); and Section 91(1)(b). He also argues that the increase can be made under Section 94.

Some of the factually unnotified assessed owners here are not residents of the Province and may, of course, have had additional rights for extension of time of service on the original appeal from their assesssment (see Section 98(2) of the Assessment Act). Quite parallel requirements for service affecting jurisdiction occur under the Municipal Board Act. The co-assessed owners are not Appellants (See Section 27(1)(e) of the Municipal Board Act) since they have not appealed. The Assessment Act merely provides they receive a notice of appeal as "a person other than [the Appellant] in whose name the property is assessed". Since they fit no other category, they are not required by that Statute to receive notification of commencement of proceedings and Notice of any hearing. (See Section 27(2) of the Municipal Board Act.) They would clearly be people that the Board could designate under Section 27(4) of that Act. They are not parties included in the list under Section 27(1) of the Municipal Board Act. Admitting that statutory list is not an exclusive list but an inclusive one, can these omitted co-assessed owners be bound by the Board's action on this appeal under any statute? The Notice of Hearing has not been sent to the Appellant's co-owners.

If an appeal is decided on the merits in favour of the Director's requested increase, persons who didn't initiate an appeal and who received no actual notice of any hearing or notice of appeal would be subject to having their assessment (and therefore their taxes) raised in the total absence of any actual notice to themselves. On the other hand, if they, by default, or even by delegation, abdicated their management functions over their real estate interests then they could, under the Assessment Act, suffer more severe penalties then raised taxes. For example, they could lose their entire property at a tax sale. A reasonable and prudent owner of real estate has a positive duty, to himself, in Nova Scotia real estate investments, to inquire and to have investigations at least annually as to:

(i) occupancy;
(ii) taxes, mortgages and other debts;
(iii) insurance,

and he can suffer many extensive losses if he fails to be vigilant, either in his personal monitoring of his interests, or in selecting an appropriate delegate to perform these functions for him. In other words, an assessed owner of real estate in Nova Scotia can often suffer intense losses borne by his own lack of supervision of his property. Perhaps the other joint assessed owners here, risking the possibility of an unauthorized and unnotified assessment appeal, would not suffer more than would an ordinary real estate investor who ignored his duty to himself and improperly delegated his supervision or failed to observe a hostile occupancy. For reasons set out elsewhere, the Board will not consider (as it is inadmissible evidence now) the "trust agreement" filed (after the conclusion of the evidentiary portion of this appeal hearing) by the Appellant, Donald Cummings. In any event, in the circumstances and for all the above reasons, there is no admissible evidence before the Board of delegated authority, sufficient, in itself, to bind the non-active assessed co-owners. If Section 33(4) of the Assessment Act does not drag into this appeal these inactive owners, then they are not drawn into the appeal on the merits. On the evidence admitted before this Board, they have not received a Notice of Appeal and were entitled to receive one, and therefore the Board has no jurisdiction to hear the appeal of the assessment of 1684 Walnut Street.

The criteria under Section 33(4) of the Assessment Act are:

a) more than one person exercising control;

b) the notice must be:

  i) Notice of Assessment;

  ii) Notice of Rating;

  iii) Any other notice required to be given by the Act;

c) The service of the notice must be made on one of the persons exercising control and service on that one will be service on them all.

Section 33 has as an explanatory note "Assessment in name of Executor or Agent". The subject property is not assessed in the name of any person in such representative capacity. A careful reading of Sections 33(1); 33(2); 33(3) of the

Assessment Act does not necessarily preclude that Section 33(4) ("Service of Notice") can be read broadly and may have a more general application and may both gramatically and legally stand by itself and modify sections other than Section 33. The Notice of Appeal is clearly such a notice. In this case the Notice was filed under Section 100(1) of the Assessment Act. Under Section 101(2), the statute has called process provided for under the Municipal Board Act into the assessment appeal chain provided for under the Assessment Act.

In an appeal before the Regional Assessment Appeal Court, the Notice of Hearing would be sent out under Section 86(1), (2) and (3) of the Assessment Act and those are clearly notices within the Assessment Act. However, Section 100(2) of the Assessment Act merely gives the Nova Scotia Municipal Board the power of the Regional Assessment Appeal Court. The Board has given, and from a logical point of view must give, a Notice of Hearing. Since the Board can only act pursuant to some statute, the Notice of Hearing in this case could only be given as required by Section 27(2) of the Municipal Board Act. Section 25 of the Municipal Board Act deals with the advertisement of Notice of Hearing by the Board and Section 25(3) of that statute excludes from newspaper advertising "the hearing of an appeal from an assessment". Section 4 of the Municipal Board Act deals with the powers and duties of the Board. Section 4(a) of the Municipal Board Act refers generally to the

Assessment Act as to duties of the Board and Section 4(b) deals with powers and duties under any enactment. Section 25(3) of the Municipal Board Act refers to an appeal from an assessment. Section 45 of the Municipal Board Act makes many detailed references to the Assessment Act. The multiple references to the Nova Scotia Municipal Board Act and the Assessment Act have already been here cited. Thus the Assessment Act authorizes an appeal before the Municipal Board. Section 27(2) of the Municipal Board Act requires that parties be notified of the commencement of the appeal and of any hearing. The Notice of Hearing required by Section 27(2) of the Municipal Board Act could be one of the types of notices mentioned in Section 33(4) of the Assessment Act as being "any other notice required to be given by this Act." The Notice of Hearing being delivered to Donald Cummings could thus have been served on him and through him to all other assessed owners. If this were the Board's finding, then service of the Notice of Appeal would have likewise been perfected. Had the Board found otherwise as to the alleged agency, then service was unnecessary as notification is built into any proper delegation or agency. Had the Board found thus, service on one of the persons exercising control would have been service on all the persons exercising control. Thus all proper Notices would have been given for 1684 Walnut Street, Halifax, and that appeal, as with the others here, would have been disposed of on its merits.

At first blush, the Board was prepared to make such a finding as has just been outlined.

In an earlier decision of the Board, Director of Assessment v. F.M. Chipman, NSMB-109-85-A, the Board had occasion to consider the curative effects of Section 33(4) of the Assessment Act. In Chipman, the Director was the Appellant and Chipman, one of the three assessed owners, was the only assessed owner to receive a Notice of Appeal and a Notice of Hearing. Chipman objected to the jurisdiction of the Board to hear the appeal on the grounds that all the assessed owners had not been served Notices of Appeal. In Chipman, as in the instant case, the Board found there was insufficient proof of agency in the man Chipman (who had been the only assessed owner served). Although Chipman was an appeal under Section 100(3) of the Assessment Act and this appeal is under Section 100(1) of the Assessment Act, the operative phrases used are quite similar, viz:

> Section 100(3) - "...the person in whose name the property is assessed...";

compared with:

> Section 100(1) - "...the person in whose name the property is assessed if he is not that person...".

Chipman sets out Section 33(4) of the Assessment Act (at page 7 of the decision) and then states "since no agency has been established or proven and there was no evidence that there were more than one person exercising control s.s.(4) of Section 33 does not assist the Director in the case.

The Board declines to assume jurisdiction to hear the appeal on the merits because of the failure to serve [all] the persons in whose name the property is assessed contrary to the provisions of s.s. (3) of Section 100 of the Assessment Act."

In this case, there were no persons proven as exercising control other than the Appellant. Based on the same reasoning as Chipman, in this decision the Board holds that it has no jurisdiction to hear Donald Cummings' appeal on 1684 Walnut Street because of the failure of Mr. Cummings to serve Notices of Appeal on other persons in whose name the property is assessed under the provisions of s.s. (1) of Section 100 of the Assessment Act.

GENERAL VALUATION REFERENCE

Now that the Board has determined that it has jurisdiction to hear only the appeals (A) to (C) inclusive, it will give, in each case, thumbnail sketches of the evidence before it on each property in indexed alphabetic order in an attempt to determine the valuation of each property pursuant to the Section 38 of the Assessment Act which was in force at the time of the making of the assessments appealed from.

In his brief, Mr. Duplak criticized the brief of Mr. Cummings in two phrases which I will quote together:

> "...it is almost impossible to sift out the arguments that relate solely to the evidence presented at the hearing" and later "I will not attempt to go through

> Mr. Cummings brief paragraph by paragraph trying to decipher what is argument based on evidence presented and what is argument presented based on new evidence."

Mr. Duplak may voluntarily refrain from such an apparently arduous task: The Board cannot. The Board must make just such a search of the evidence and do an analysis of both briefs under both these headings precisely as Mr. Duplak said he would not do.

The Board has set out its detailed critique of Mr. Cummings' brief in Appendix "A" to this decision and sets out the text of his brief in Appendix "B" to this decision. The main body of this decision will deal only with those arguments contained in the briefs to such an extent as is necessary to forward the decision.

There would be no problem with assessments if each property to be assessed were sold in a freely negotiated market sale of each property on the date prescribed by the Director of Assessment in accordance with his usual practice. Assessment would follow the market and assessment would be uniform throughout the municipality. All the various manuals, approaches, and schemes touted in evidence by assessors are merely tools to try to adapt assessment valuation to these facts:

1. That all the properties to be assessed have not in fact been sold;
2. Those properties that are sold are seldom sold in a free market as of the date of assessment set by the

Director of Assessment;

3. That various types of properties have various types of characteristics to be taken into account in the valuation; some considerations for valuations are almost totally economic, some properties are valued for aesthetic or personal or other human reasons rather than "pure" economic reasons.

All these valuation tools are merely used to try best to approximate the value required to be arrived at under Section 38 of the Assessment Act. The assessor tends mechanically to use methods of estimating building costs, front footage, land values, market data tables, tables of inflation and categories of buildings. His duty is to assess in a uniform manner all properties in the areas of his concern. An investing land purchaser may use the same valuation techniques as the assessor. He may, however, be successful using much more apparently primitive techniques of valuation since he need value only those properties which he has chosen to consider actively. He may ignore all properties in which he has no interest. On the other hand, the assessor has no personal stake in the valuation at which he arrives, while the investing landowner may suffer severe loss if he values a property wrongly.

All and any techniques of valuation are valid for use when it becomes necessary to arrive at the value of property. The problem in each and every assessment appeal is merely to determine what is the value of the property in question as required by the Assessment Act in force at the time. The assessor has, or should have, access to sufficient evidences of sales (as well as to total evidence of valuation within the City) to be able to compile satisfactory statistics of sale values and, with those statistics, to run tests of his level of success in official assessment valuation. To the extent that he has been proven (admittedly after the event) accurate - he should be reinforced in his methods of valuation and should have confidence in his judgment on valuation. To the extent that he is proven inaccurate by these tests, he should be able to re-analyze his work, determine where he went wrong and improve on his methods and techniques of assessment valuation. Assessment as done by an assessor, is an art, attempting to masquerade as a science, based on formulae and mathematical calculations. Whatever the techniques used, the assessment arrived at must conform to the requirements of Section 38 of the Assessment Act.

(A) VALUATION 5651-53 Fenwick Street

Mr. Cummings testified that this property, 5651-53 Fenwick Street was a duplex consisting of an upper and a lower floor. He stated that the upper flat was in average condition but the bottom flat was completely gutted out down to the bare laths. Ceilings were absent, and the fireplaces were pulled out. Some of the floors were jacked up and there was no kitchen and there were no modern cabinets. He said the value of the bottom flat was zero. He said its only value was the value it had in holding up the second floor. He said this property had been in this condition for five or six years. he said the property had a large backyard but there was no street access to the yard. He said these defects all went to diminish the property's value and the assessor had not sufficiently allowed for these defects in the structure. In addition, he said general repairs were required and, inter alia, the gutters and the fascia board on the building had to be replaced. In regard to this property he listed "his" comparables to it and he said the particular comparable that was applicable was the Tomar property located at 5639 Fenwick Street, Halfiax, which was assessed at $108,000.00 and sold for $156,000.00 in January, 1984. He further testified that to bring the gutted flat back into use would cost $30,000.00.

For the Director, Mr. Ronald Borne, the assessor, dealt with this particular property mainly by referring verbally under oath to his valuation report filed with the Board as a portion of Exhibit C-6. At page 14 of that report, the assessor seems to agree with Mr. Cummings' assessment of the condition of the property with these words "the subject here is below average condition due to the lower flat being completely gutted out."

The burden of adducing evidence in this type of appeal is on the Appellant. In practice, this burden seems modified when the Director, in each assessment case, provides the assessor's opinions of value and his estimates of value in a documentary form. This aberration from the normal burden of proof is more apparent than real since the information contained in these reports is basic to any consideration of valuation, the information is readily available to the Director, and, in the absence of any discovery process, this information is not particularly available to the citizen Appellant. Having said this, the general burden of proof lies on the Appellant.

In this case the income approach to valuation was discounted, as non-applicable, by the assessor. The Appellant, at various stages of the hearing, made allusions to the income approach to valuation but he adduced no evidence of income generated by any of his units under appeal. Without that basic data, the Assessor, the Director, the Regional Assessment Appeal Court or this Board could not calculate, whether they wished to or not, the value of the property by the income approach since the Appellant, who had the data on income, did not introduce the data into evidence. He could have introduced such evidence had he thought it of use. That is not to say that the Board feels that the income method of calculation ought to be here used in the valuation of this property. It is merely to say, upon the evidence before it, no use of the income method of valuation is possible. In this appeal, the income data valuation approach is not available to the Board, in any event, to help it arrive at the assessed value of 5651-53 Fenwick Street.

On the evidence, there were no arms length sales of 5651-53 Fenwick Street January 1, 1983, or even at any other date, and thus some indirect method must be used in arriving at the valuation for assessment purposes of the property.

At first blush, because of the extensive state of disrepair attested to by the Appellant and corroborated by the assessor, the Board has some difficulty seeing how any market data approach could be useful. The market data approach implies a saleable asset and a hypothetical market. Who would buy this derelict? If the Board were correct in this first impression, then it could only determine the assessment valuation by using the cost approach method of valuation since it is the only method remaining of the three categories put before the Board in argument as suitable methods of valuation. Both parties, however, in the end, seem to agree that since an indirect approach to valuation is a necessary tool in arriving at a valuation, they both prefer to use the market data approach.

The assessor listed as his comparable sale number 1 a property on South Street a block and a half from the subject property which is also a duplex. The assessor decided to disregard this house (located close to the subject property). At page 36 of his report he states that "Sale number 1 had the greatest amount of adjustment with the three biggest adjustments being house size, condition and lot size and for the reason sale number 1 will not be used for the sales of this analysis." Yet sale number 1 is the closest to the subject property in geographical proximity. On the other hand, sales number 2 and 3 do not even show up on the same maps as the subject property. The maps produced in evidence show a rectangle of about 7 blocks by 10 blocks. The subject property and comparable sales number 2 and 3 appear on the same type of a map in the same report but the two maps do not even contain the same streets. For the uninitiated in the street geography of Halifax, the geographic relationship of the two comparables to the subject property is not at all clear. The Board notes from the second map before the Board, that the two comparables selected were within three blocks of each other. The Board has looked at a general type of diagramatic map of the City of Halifx produced by the Board for its own information and entitled "Halifax and Dartmouth Cities by the Sea", published by Murdock Resident Press, 16 Slater Street, Amherst, N.S. and circulated by H.H. Marshall & Sons, and the Board took this map and marked on it the approximate locations of the various assessed properties as well as the locations of the various comparables. The Board found comparable number 1 to be two or three blocks (approximately 1000 feet according to scale) from the subject property. That was property 5307 South Street. By the same calculation, the Board found comparable number 2 produced by the assessor, (6311-13 York Street) was 4500 feet (some 14 or 15 blocks) from the subject property. Comparable number 3 (being 6169-71 Shirley Street) was approximately 5200 feet by scale from the subject property and was some 13 to 15 blocks from the subject property. The apparent common denominator for the assessor's selection of comparables to the subject property was the "duplex" nature of the three properties alluded to and that geographic proximity was a very low determinant in the assessor's selection of comparables. The Board finds it passing strange that, in his evidence, the assessor gave no detailed explanation of why he had to go so far afield to find comparables. In his report, the assessor using the market data approach, made no 15% multi-unit reduction from its market value to arrive at its assessed value.

The Appellant's contention in his grounds for appeal "that the 15% reduction in the assessment so appealed" is not binding on the assessor, on the Director or on this Board. In point of fact, the assessor in the City of Halifax for the relevant assessment year reduced the value of residential buildings in Halifax consisting of more than one unit by 15% on account of that fact alone and then arrived at his assessed value by that process. As the Board understood Mr. Borne's evidence, all residential buildings containing more than 1 unit were reduced in assessment by the amount of 15% merely because they contained more than one unit. In that case, since 5651-53 Fenwick Street is in fact a two-unit building I can see no reason to destroy the uniform application of such a percentage even if such a reduction has no statutory basis. Although in the calculations tendered to the Board this 15% reduction was only used in the cost data approach, the Board could see that if it were going to be applied that it ought to be applied at least to modify values arrived at by the market data valuation technique. The Board cannot see that any of the valuations arrived at by Mr. Cummings or by the assessor are based on this percentage blanket devaluation or that either party uses such calculations in arriving at the market value of the subject property.

Mr. Cummings' "comparables" on 5651-53 Fenwick Street are different than those of Mr. Borne. Certainly his comparables 12, 13 and 14, as shown on Exhibit C-5, are more geographically aligned to the subject property. They do not have the "duplex" nature found so attractive, in distant properties, by Mr. Borne. The sales prices of these "comparables" are almost double or more than double the assessment of the subject property. The thrust of Mr. Cummings argument is that properties on Fenwick Street seem to have an assessment of approximately 80% of their adjusted sale prices and therefore the assessment of 5651-53 Fenwick Street should be approximately $70,000.00. The Board feels the assessor should have fully and understandably delineated for the Board the reasons why he took such distant properties as comparables. The Board finds difficulty in accepting Mr. Cummings' comparables since they are so different in kind and number or units, (although close in geographical aspect) to the subject property.

The Board accepts the market data approach followed by both sides to this appeal. The Board feels the burden was on the Appellant to show his comparables were superior in quality to those of the assessor and the Board feels that, since it is unable, on the whole, to determine which comparables were superior, the Appellant has not discharged that burden. The selection of choice comparables is a basic premise for the accurate valuation of real estate for assessment purposes. The assessor has made a binding choice of comparables and thus has set the valuation, subject only to the Appellant meeting his burden of providing superior comparables. Since he has not done so, the assessor's valuation arrived at by the application of the market data approach will be accepted by the Board. The Assessor, however, in setting a value of $82,000.00, did not allow enough depreciation caused by the total gutting of one flat. Nowhere does the appropriate calculation show where Mr. Borne had done this, although he stated as a fact that that's what had happened. He should have, as well, written off the fixtures in the gutted flat. The evidence of the cost of these fixtures before the Board a net repair cost of $1,730.00. The lack of parking is also a factor which the assessor did not allow for in his valuation. The only quantified evidence of this is under the heading

"Paved Driveway" in Exhibit C-6 and which for Comparable 3 is listed at $750.00 differential for the presence of three paved driveways. Allusions were made in the evidence concerning the winter parking regulations of the City of Halifax. Mr. Duplak attempted in his brief at page 4, perhaps, to adduce new evidence. He sums up the Appellant's view accurately as follows: "The Appellant automatically assumes that the mere fact that a property does not have a driveway, and a comparable does, that there should be a reduction in the assessment of the subject property which would reflect a decrease [in] value from that comparable property with the driveway." He then goes on to say that is a fallacious argument. The Board is not so sure. The effect of the comparable (other things being equal) having a driveway, and the subject property not, should have the effect of the assessor adjusting the value of the comparable before making his comparison of the value of the two properties leading up to the setting of the valuation for assessment purposes of the subject property. That is not to say, however, that, as a result of such comparison, the assessed valuation of the subject property will not be reduced.
The Board looks at prospective property purchasers as being people who either have cars (and expect tenants with cars) or do not have cars (and do not expect tenants with cars) or some combination of these four classes. Those purchasers without cars and expecting no tenants with cars would ignore the absence or presence of a driveway and consequently

the value arrived at by interpreting their offer would be determined by other aspects of the property. Those with cars and/or expecting tenants to have cars would be very aware of the lack of driveway parking. To them, the lack of driveways would be taken into consideration in their purchase offers and would diminish their purchase offers solely because of the lack of driveways. While there is no evidence of the numbers (or percentage of the total group of potential purchasers) of the prospective purchasers or the mix of those purchasers the Board can assume:

1. That there is a finite group of potential purchasers;
2. That the potential purchasers are human beings, or are represented by human beings, in the Halifax context;
3. That of any group of purchasers in Halifax, a large percentage will have cars or will presume that their tenants will have cars and the lack of driveways will reduce the value of the subject property in the minds of this percentage.

In the absence of direct evidence of valuation, the Board will judge, on the whole of the evidence, the value of the lack of driveway to be $1,000.00 (acknowledging Mr. Duplak's argument as to the reduction of available square footage and/or increase in front footage).

Thus the valuation of 5651-53 Fenwick Street will be set for the assessment year 1984 as follows:

Valuation per Exhibit C-6	$ 82,000.00
Less net reduction for change in value of comparable not adequately calculated by assessor re differences in driveways	1,000.00
Less depreciation for fixtures in gutted portion	1,730.00
Net	$79,270.00
ROUNDED TO:	$79,300.00

Thus the Board values 5651-53 Fenwick Street for the assessment year 1984 at $79,300.00 thus reducing the amount set by the Regional Assessment Appeal Court by $1,000.00.

B. VALUATION OF 1289 SOUTH PARK STREET

Mr. Cummings said his main question concerning this assessment was based on the properties he considered its comparables. He described his property as being a large building on a small lot with no driveway and no parking. He said that replacements or improvements had to be made which would cost about $6,500.00. He said that the comparables he wished to compare with, 8 to 14 on his list in Exhibit C-6, sold at amounts much higher than their assessments and although many of them were individually much more valuable than his property they were located in close proximity to the subject property. Some of his comparables were three unit buildings. He went into some detail on all these properties and into great detail on the next door property at 1293 South Park Street.

He declined an adjournment for more time to prepare his appeal. The Director was also given a chance for an adjournment to deal with Mr. Cummings' comparables. Mr. Duplak suggested he did not need an adjournment.

Mr. Ronald Borne filed Exhibit C-5 which was his valuation of this property and, in that, he came to a land value of $43,942.00. He came to a value of the total property by the cost approach of $151,500.00 and by a direct market approach of $144,000.00. He allowed 45% depreciation and felt the property was in average condition. He used a monthly discount on the sale price of 1% per month to adjust the sale price of the comparable to the date set by the Director for the assessment valuation. Without repeating the remarks of various approaches to be used in valuation (including direct market information of sale), the assessor rejected the income approach to valuation for the same reason given to the Board in the portion of this appeal dealing with the property at 5651-53 Fenwick Street. The Appellant suggested the income approach should be applied, but provided no income figures on which to base that approach. As in the evaluation of 5651-53 Fenwick Street, the Board cannot apply the income data approach to valuation, even if it would like to, since there is no evidence of income before it. The Board rejects, for these reasons, at least, the income approach to valuation as it did on 5651-53 Fenwick Street.

If the Board were to employ the reproduction of costs method to valuation and accept that method of evaluation it would reduce the assessor's figures by the 15% "more that one unit" reduction allowance to make it uniform with all other Halifax multi-unit residential assessments. The Board repeats again its discussion of the 15% reduction that it made already in the decision concerning 5651-53 Fenwick Street and thinks that for uniformity, since the property is in Halifax, and all other multiple units received this allowance, the allowance might properly have been considered here.

The amount of the 1984 assessment for 1289 South Park Street is in the Appellant's brief (and proved by the Appellant) and the "in effect" cross-appeal by the Director seeks to add another $6,000.00 of assessment on the property. This "in effect" cross-appeal by the Director results from the evidence adduced by the assessor put together with a reading of Sections 101; Sections 89(1)(a) and Sections 91(1)(b) of the Assessment Act.

Again the subject property had no recent sale. For that reason the assessor's comparables must first be looked at. Sale number 1 is on the next lot to the subject property and is the next best thing to a sale of the property itself. Its sale took place three or four months after the January, 1983, date. It has a house of the same vintage as the building on the subject property and in many other particulars is very, very close to the subject property in the table of comparison set out. According to the assessor, it was therefore a very vital comparable. There are no driveways on either property. Comparable number 3 is about 7 city blocks and about 2600 feet, as scaled by the Board in a straight line, distant from the subject property. According to the Board's scaling, comparable number 2 is about 15 city blocks and about 5000 feet from the subject property. Again, there is no explanation in the assessor's report, (Exhibit C-5) or in his oral testimony, explaining the discrepancy of thirty-five years age differential in the two properties without any compensating adjustment to value made therefor. In his report, there is no attempt made to explain the large geographical distances of two of his three comparables from the subject property.

At page 23 of his report, he said the comparable sale number 1 has the least amount of adjustments in relation to the subject property. While sales number 2 and 3 are comparable to the subject property they have a greater amount of adjustment so therefore the weight will be given to sale number 1. With only 1 comparable, there is no evidence whether or not the assessor should have tried to better that good comparable with one or two others to prove that its valuation is not a fluke.

In his brief, the Appellant states that the assessor in using the market data approach in his valuation should allow 10% deduction so that the assessment of the subject property will be uniform with other 1984 assessments and adjusted sales prices (see middle of page 5 of his brief). At the bottom of page 6 he says that at least $1,000.00 per unit should be deducted from the property value for lack of driveways. Again at the bottom of page 8 of the Appellant's brief, since the January 1985 assessment of $129,200.00 was set by the assessor after the assessor's October, 1984, inspection of the premises, the Appellant argues that is difficult to understand why the assessor's valuation report of July, 1985, came up with a value of $144,000.00.

The real comparable both parties used was 1283 South Park Street. Its actual sales price was $143,000.00. Its adjusted sale price was nearly the same, namely $144,100.00. The assessment that sale yielded for 1984 and 1985 was, according to the Appellant, $127,700.00 in each year, 1984 and 1985. To arrive at that assessment, the value arrived at by market data approach was in fact reduced by approximately $16,400.00 or in the vicinity of 11.4%. 11.4% off the value of the subject property arrived at by the market data approach would be $144,000.00 divided by 11.4% for a reduction of $16,316.00 rounded to $16,300.00 which would yield an assessment of $127,700.00. These similarities, in the view of the Board, are both clear and compelling. It is identical with the assessment applied to the comparable. Allowing for an inflation in value because of the passage of time between the two assessments, it could reflect accurately the assessment of the subject property in 1985, which is $129,200.00.

The real question is whether there is sufficient evidence to allow the application of any reduction from the property value so clearly targeted with such close comparables. The Board accepts the comparable of sale number 1 and its value arrived at by the market value approach at $144,100.00. The Board accepts the almost identical value arrived at by the market data approach of $144,000.00 for the subject property on January 1, 1983. Does this finding lead inexorably to an assessed value of $144,000.00 under Section 38 of the Assessment Act for the year 1984? The Board is satisfied that in the year in question, the Director in the Halifax City Assessment Region had a policy of reducing assessments of multiple units 15% merely because they were multiple units. It also has the evidence before it from the Director that there is an approximate 10% discrepancy in the level of Halfiax assessments so that the level of Halifax assessments were running about 10% less than the market value of the assessed properties. The Board also gives some weight in setting value to the cost of repairing the property deficiencies mentioned in the evidence. It comes to this conclusion that there should be reductions despite the Appellant's urging that the Board should not do so on account of the "multiple unit" reduction rule and despite Mr. Duplak's allegation that there is evidence before the Board to the effect that the percentage multiple unit deduction was not made by the assessor on the subject property. The Board believes, on the evidence, that the assessor made such a reduction for multiple units throughout the City that year and that that was a policy within the City for that year. Mr. Cummings argued that the lack of driveways reduced value and also was not compensated for in the Assessor's valuation of the subject property. These three factors added together would greatly exceed the 11.4% reduction in the subject property's value necessarily made to reduce the assessment to be in conformity with the comparable in assessment. The comparable is so close in all remaining aspects, that the Board can see no reason why the assessment arrived at for the comparable should not be the assessment arrived at for the subject property. Thus the assessment for 1289 South Park Street is set by the Board, for all the above reasons, for the assessment year 1984 (and its valuation as of January 1, 1983), at $127,000.00. The Board finds that this is the appropriate assessment made under the tests provided for in Section 38 of the Assessment Act as it then stood. This finding is an $11,000.00 reduction from the assessment set by the Regional Assessment Appeal Court.

C. VALUATION OF 5649 FENWICK STREET

In speaking on 5649 Fenwick Street, Mr. Cummings drew comparable relationships between it and various other properties and especially with 5639 Fenwick Street. He noted the relationships their various assessments brought to their respective sales prices. He calculated their assessments were about 66% of their sale prices. He felt that assessments were far out of line in his comparables when compared with their sales values and when compared with the assessed value arrived on the subject property by the market data method. He felt he should have the benefit of the same percentage differential between value and assessed value. The witness pointed out that the Government had a much better access to comparable information than he had. He said he had asked for information from the assessor with respect to the assessor's comparables, but the assessor denied him access to that information.

He felt that the market data approach was the best approach to valuation. He said he had obtained free appraisals of his property from various real estate people all of which were discounted back from March 1984, by his calculations, to the relevant date. He felt that his property, when valued having proper regard to time, would have an $85,000.00 market value as of January 1, 1983. The value thus arrived at ought to have been reduced by the percentages that he had stated above.

Again Mr. Ronald Borne was the assessor who had done an assessment of this property. In part of Exhibit C-6, he valued 5649 Fenwick Street by the cost approach at $82,500.00 and by using the market data approach he arrived at its value of $80,100.00. He said the property was in average condition. He said that he didn't do a valuation by the income approach on this property. He said that he felt the Halifax assessment people were striving to assess properties at 100% of their market values and, in Halifax City, 1984, on a statistical test made against statistics reporting actual known property sales and comparing those sale values with their respective assessments they proved Halifax City's assessment level for residential property was 90.2% of its market value. Exhibit C-3 tendered by the Appellant does not have the detailed information concerning 5649 Fenwick Street that it has concerning certain of the other properties under appeal. The evidence itself is quite short on this property and the Board very carefully listened, at least three times, to the evidence given by the Appellant concerning the property, once at the hearing and twice by re-listening to the tapes with a view to assessing the facts alleged on page 9 of the Appellant's brief. The factual representations made in the Appellant's brief (in order to be considered) must appear in the oral testimony of Mr. Cummings or in his documentary evidence (primarily Exhibit C-3) or, in some cases, in the oral testimony of Ronald Borne and his documentary evidence, in this case presented in Exhibit C-6.

The 1984 assessment of the unit is $87,700.00 and the assessor valued it before the Board by the cost approach at $82,500.00 and by the direct sales approach at $80,100.00. (Variously at $80,100.00 on page 1 of

C-6 "Summary of Salient Facts" and on the certificate page at $80,200.00). In his brief, Mr. Cummings says the subject property should be reduced to $76,000.00. His argument shows 5649 Fenwick Street $6,000.00 more valuable than 5651-53 Fenwick Street and the assessor shows 5651-53 Fenwick Street at $1,800.00 more valuable than 5649 Fenwick Street. Sale number 2, 1139 Wellington Street is in the assessor's comparables and is easy to locate on Schedule C of Exhibit C-6. It is three to five city blocks from the subject property and the Board has scaled it as slightly over 1,000 feet or more in a straight line. Comparable number 1 is some 14 city blocks and some 6,000 feet away in a straight line. Comparable number 3 is some five blocks closer to the subject property and distant therefrom, by the Board's scaling, 5,200 feet. Sale number 2 is sufficiently close to be a proper comparable, geographically. There is again no explanation by the assessor why he went so far afield to find the other comparables of sale number 1 and sale number 3. It may have been necessary to go that far for the comparables, but no explanation was attempted concerning the necessity. The Appellant, in verbal argument contained within his testimony, suggested 5675 - 76 Fenwick Street as a comparable and said the Board should adopt the value arrived at by the market data approach, apply the 60% ratio of assessment to value and thus reduce the assessment by about 40%. Concerning this property, the Board has hesitated to make such a direct comparison, market value to assessment value. All details of both properties are so much different and require so much adjustment that such an approach is not helpful. In every case there must, by definition, be a ratio between assessment and value when the value becomes known and the assessment is set. The Appellant has brought insufficient evidence (or has brought no evidence) to discharge his burden which is to produce enough evidence to persuade the Board to reduce the assessed value of 5649 Fenwick Street. Thus the Board takes the assessor's valuation of $80,100.00 as the valuation of the property as of January 1, 1983, for the assessment for the year 1984. This assessment is a reduction of $7,600.00 from the assessment set by the Regional Assessment Appeal Court.

D. VALUATION OF 1684 WALNUT STREET

The Board has dealt ad nauseam with 1684 Walnut Street (supra) as to whether or not the assessment was properly appealed to this Board.

The Board has found that the Notice of Appeal was not served on certain of the Appellant's co-assessed owners and therefore the Board had no jurisdiction to hear the appeal respecting 1684 Walnut Street. Since the Board has heard all the evidence of valuation, regardless of its decision as to jurisdiction, the Board will express its opinion on valuation based on the evidence that it has heard as to the valuation of 1684 Walnut Street.

Mr. Cummings said this was his own residence and was in an extraordinary state of disrepair. The roof leaked and needed to be replaced. The furnace was obsolete and no parts or service was available and it frequently broke down and was unreliable and had to be replaced. He said the painting was in bad shape requiring a scraping and a paint job and he estimated the total of these items to be $8,500.00 and he felt that no appropriate deductions in value had been allowed by the assessor in his report filed before this Board. He said there were six or seven properties (references 1 to 7(a) in Exhibit C-3) he considered comparables to the subject lot and he dealt with them as comparables.

Mr. Borne, the assessor, reviewed his report which is Exhibit C-4 and he qualified himself as an expert witness and said that he didn't use the income approach to valuation. He considered both the market data approach and the cost approach to value and he accepted the market data approach as being the appropriate approach. He used a local modifier 1.72 and he depreciated the property 45% saying it was in average condition. He arrived, of course, at the land value by the usual method set out in the assessment report that he had filed with the Board and he agreed that Mr. Cummings' costs of replacing the roof and furnace appeared to be accurate costs. This particular property is single family dwelling, occupied by the Appellant Cummings and owned by himself and others according to the evidence properly before the Board.

The Director relies on his valuation of 1684

Walnut Street and contends that the appeal was not perfected by the Appellant. If he had failed in that sought for objective, (as the Board has indicated, the Director has succeeded), then the Director is, in effect, cross-appealing to bring Mr. Cummings' 1984 assessment of $94,300.00 up $2,700.00 to $97,000.00. The Appellant wishes to reduce the assessment of property for the assessment year of 1984 from $94,300.00 to $78,000.00 a reduction of $16,300.00 from the actual assessment and $19,000.00 lower than the Director's suggestion. Again the assessor and the Appellant, Mr. Cummings both used the market data approach and excluded the income approach. By the cost approach, the assessor arrived at a value of $96,773.00 rounded to $96,800.00. His calculation under the market data approach arrives at a value of $97,000.00 for the subject property. Comparable sale number 3, 1673 Chestnut Street is in the back of the same block containing the subject property. His comparable sale number 1, 1876 Walnut Street, is only two city blocks from the subject property on the same street. No criticism can be made by the Board, on the grounds of geography, of the assessor's selection of these comparables in relation to the subject property. From a location point of view, all are appropriate. The photographs show the comparables are in a much better state of repair than the subject property and, as to sales 1 and 2, the assessor verbally agrees. He says that the subject property and comparable number 3 both are average in condition. The photograph would seem to disagree with that view. The thrust of the Appellant's argument is that the subject property is below average in condition and that the cost of bringing the subject property to "average" would be $8,000.00 to $8,500.00 and he therefore suggests that the Director's depreciation factor should be greater than the 45% allowed for. The percentage decrease may not be in question if the market data approach is approved by the Board, but the actual costs of bringing the property up to "average" may be. The Appellant uses the property next door, 1680 Walnut Street as his comparable with a December, 1984, sale value of $105,000.00 and an assessment of $84,900.00 in 1984 and 1985. The Board, in the 1289 South Park Street portion of this appeal, had such identical comparables to deal with it would seem almost obscene in that case that the comparable didn't agree in assessment with the subject property as it did in all other items of comparison. The evidence of the obsolete furnace, the inability to find replacement parts necessary to repair it, the assessor's agreement that Mr. Cummings' costs were appropriate, would have allowed the Board to adopt Mr. Cummings' reduction of $8,500.00 to the value of $97,000.00 put on the property by the assessor. The Board therefore accepts the valuation of $97,000.00 less the amount of $8,500.00 required on the evidence to bring the subject property up to average condition and would have set the assessment for the 1984 year at $88,500.00, (a net reduction of $5,800.00 from the original assessment) had the Board jurisdiction to hear this appeal which it had not. In result, of course, the assessment set by the Regional Assessment Appeal Court stands.

There will be costs on the appeal to the Appellant who has been successful in part, to assist the Appellant with the cost of employing a reader in the amount of $100.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of March, A.D., 1986.

RICHARD L. WELDON, Member.
NOVA SCOTIA MUNICIPAL BOARD.

APPENDIX "A"

SHORT CRITIQUE OF BRIEFS

A. VALUATION 5651-53 FENWICK STREET

Mr. Duplak's memorandum is silent concerning this specific property. Mr. Cummings deals with the property on page 10 of his memorandum. I shall disregard the first six lines of that memorandum since the alleged facts stated there were not adduced in evidence before the Board.

The next paragraph seems to be pertinent as a rather detailed critique of the evidence taken at the hearing and seems to state Cummings' position that the assessor valued kitchen fixtures and bathroom fixtures located in the gutted apartment for a total of $1,730.00. The Board assumes it is Mr. Cummings' argument that this $1,730.00 should be deducted from the value of the property and that is the meaning the Board takes from this particular paragraph of his brief as being Mr. Cummings' position.

The next paragraph to the bottom of page 10 seems to follow the thrust of oral evidence of Mr. Cummings and specifically refers to the necessary repairs to the buildings on the property costing $30,000.00. The same reasoning applies for the rest of the paragraph on page 12. This is either a re-hash of the evidence, or a suggestion to the Board to draw an inference as to the value from the evidence.

The next paragraph on page 11 is also an appropriate paragraph for a brief in that it deals with evidence before the Board. This finding, of course, is only as to the propriety of the argument and not as to the validity (or even, perhaps, the admissibility) of the evidence on which the argument is based.

By the same reasoning, the next paragraph is appropriate for a brief in the argument portion of the appeal; as is the next. The Board also sees no problem with the argument as it concerns 5651-53 Fenwick Street (and in general for all properties) nor for the contents of page 12 of the brief.

Appendix 1 from just below the horizontal number 1-9 to the figures $189,500.00 (allowing for certain errors in spelling) was before the Board. As Mr. Duplak pointed out, the notes (See Exhibit C-3) were not before the Board in documentary form. Some verbal evidence was given concerning location compared to 5651-53 Fenwick Street and which comparables were to be compared to which property. The details of this verbal evidence, as it relates to the locations at least, were known to the assessor Mr. Borne. From careful re-hearing of the tape, the Board notes "I know where they are at" is a statement made by Mr. Borne. Mr. Cummings had listed all the properties contained in his notes (Exhibit C-3) as comparables. He was able to discuss the same with some knowledge. Mr. Duplak and Mr. Borne rejected any consideration of an adjournment which would have allowed them to get the City's detailed information on each property - information apparently not so easily accessible to Mr.

Cummings. These "notes" therefore contain items that were discussed in the oral testimony, are capable of being discussed in a brief in relation to the oral testimony and contain the types of information the City had available to it on its records or even information that is inoccuous. In addition, having circulated his written documents the Friday afternoon before a Monday morning hearing, Mr. Duplak is not in a position to complain about receiving a report in two parts, one at the hearing, and one later. The Board, at least, will read the "notes" in arriving at its decision as bearing on either the evidence before the Board or at least argument on the evidence before the Board. The evidence is not new or surprising to the other party.

The Board might as well continue to examine the appendices of Mr. Cummings' brief to determine whether they are new (and therefore inadmissible) evidence or whether they are merely calculations made refining evidence properly before the Board or representations made on evidence before the Board. Appendix 3 appears to be a statistical rehash, an attempt to demonstrate a point, or to lead to a conclusion related to evidence brought before the Board and as such appears to be appropriate subject matter for a brief such as the one here filed. Appendix 2 is new evidence of the inadmissible kind as not adduced at the hearing. The references following 1684 Walnut; 6241 Jubilee and 1636 Walnut were all before the Board, but the rest of the information is novel and cannot be introduced at the brief stage of this appeal as is here attempted by Mr. Cummings. With the general bulk of this Appendix being non-admissible new evidence, the Board rejects the whole of Appendix 2 as being of marginal meaning with these deletions and it will not consider Appendix 2 in arriving at its conclusions.

Appendix 4 sets forth the type of information that would have been relevant, even if of low probative value, had it been introduced in a timely manner. Since it was not so introduced, the Board will likewise disregard Appendix 4 in its deliberations. The attached letter of June 18, 1984, is a letter written of little probative value since, although brought before the Board, the appraiser who signed it was not brought to the Board to testify and was not made available for cross-examination and the evidence he could have given could have been extremely germane to the appeal. The importance of this evidence and of this letter would have been high had the evidence been properly called and therefore the Board must disregard it when it is improperly before it. Appendix 5 would ordinarily be relevant but it is inadmissible as it was introduced too late and was, as well, incomplete. Mr. Cummings had ample time to prepare. Mr. Cummings had declined any or all suggestions for an adjournment. Appendix 5 was incomplete since it did not bring in the original trust document or will which it incorporates by reference. the document in Appendix 5 is not capable of intelligent analysis without the total documents. It is too late to adduce these documents now. They were not made available during the time for the hearing of evidence (as set out in some detail above), so the Board will have to disregard the document dated July 24, 1956, in arriving at its decision.

Other portions of Mr. Cummings' brief, not already disposed of will be dealt with by the Board when it values the other specific properties. The Board will now bear in mind these comments and apply them to 5651-53 Fenwick Street being the item lettered "A".

B. VALUATION 1289 SOUTH PARK STREET

Before the Board continues with the valuation of this property, it must deal with related portions of the Appellant's brief (on the general tenor outlined above and to cover matters not previously covered but which are relevant to this specific property) to make sure it is only considering evidence properly before it in the sense above explained. Page 8 of the Appellant's brief starting with the number "1289" down to the end of the sentence seems appropriate subject matter for a brief and contains only matters which the Board may, at least, consider. The title page commencing at "April 23, 1985", is appropriate for like reason. The letter dated April 23rd, 1985, addressed to the Board is likewise appropriate. The Table of Contents is suitable for consideration. The Board's acceptance of the table of contents is in no way to be taken as agreement by the Board that all the matters listed there are necessarily appropriate for consideration by the Board.

Starting with the subject matter on page 1 the Board accepts as a proper brief argument the matters on page 1 under the heading "Brief Review". Under the typed words and figure "15% reduction..." the Board accepts as a proper content of a brief, the title, text to and including "...for both properties". From and including "In an effort" to and including, on page 2 "...valuation reports" - the Board notes the type of action contained in this excerpt of the brief was not contemplated by the Board or at law, as an appropriate method of proceeding. It was a matter that might properly have been remedied by an adjournment. Neither the Appellant nor the Director, although invited, requested an adjournment. Without a request by either party, or one party or the other, the Board was extremely reluctant (especially in view of the long time that had been available for preparation for this appeal), to adjourn on its own motion. In that light, the action of the assessor and of Mr. Duplak were appropriate to the conditions and the request for information by the Appellant were decidedly inappropriate given the explanation of the general operation of the judgemental system followed by this Board and similar tribunals.

The next sentence puzzles the Board but the Board will consider it, but only with the following meaning: "the discussion of the 15% rule being long and cumbersome the Appellant will speculate on its meaning and, based on the additional evidence of the present practice of the assessment department, he will speculate further on the various possible policy alternatives." To the extent that the sentence concerned exceeds that meaning, the Board can only conclude that it is not an appropriate matter for a brief as being new evidence.

The next paragraph is appropriate down to and including the word "generate". The next sentence is inappropriate since no C.A. MacMichael testified before the Board. He was not made available for cross-examination both as to his qualifications, if any, and, then, as to his contents of his report. The Board can pay no attention either to his report or to the remarks attributed to him. It is exactly the situation where the "crucible" test set out above by the Board clearly applies. The next sentence must be ignored since no real evidence has been adduced. The rest of the paragraph is appropriate argument although it seems to militate against three out of four of the Appellant's present appeals. Thus it may be an unusual content for an Appellant's brief, but it is entirely appropriate. The next paragraph page 2 of the Appellant's brief is appropriate down to "...$96,800.00." In the third line from the bottom of that page, from that point to the bottom of the page, the conclusions urged to be drawn from Appendix 2 have previously been ruled out as being new evidence adduced too late and the Board refuses to credit it. "Income Approach to Valuation" stated in the middle of page 3 makes argument which the Board find appropriate continuing to page 4 down to the phrase "duplexes and triplexes", eight lines from the bottom of the page. The following sentence in the brief is informational but it begs the question of who has the burden of bringing the requested information before the Board and whether the information was brought before the Board. It is the Board's view previously stated, that the Appellant, if he wished to adduce these other facts concerning income had the burden of bringing forward credible evidence of such. He did not do so and therefore the facts are not before the Board. The rest of the paragraph is an appropriate argument but of not much use in a practical sense due to the lack of the evidence of proven facts to suit the arguments made. The brief under the tital "Comparison..." on page 5 is appropriate argument. Under the topic "Subject properties...", starting at the bottom of page 5, the appropriateness of the brief goes as follows: Item Number 1 is appropriate but inaccurate on the evidence which is silent as to the use of the owner in occupation. Item 2 is correct except there is no evidence before the Board of "arms length relationship to the owner". Item 3 is acceptable with the same comment. Item 4 recites the same thing concerning the relationship between land and occupier and there is no evidence to support this. Paragraph 2 on page 6 is to be disregarded as being inappropriate in the present appeal. Speculation as to further appeals to the Board of the same properties have no place in the memorandum as filed here. The final paragraph on page 6 of the brief seems appropriate argument. The

Board goes no further at this time in its decision in analyzing the Appellant's memorandum before determining the valuation of 1289 South Park Street.

C. VALUATION OF 5649 FENWICK STREET

The Board must stop here and deal with the Appellant's brief under "5649 Fenwick Street" not dealt with earlier in this decision. The Board accepts the title to this section of the brief between the words "1649..." down to $80,100.00" inclusive. It accepts the next sentence. It accepts the next five words. It does not accept from the word "None...Fenwick" thirteen lines below the word "None". There is no evidence on the record to support these statements.

The Board accepts the thoughts, as appropriate for a brief: "Kitchens for the lower flat is in the basement which the assessor described as being low and of cheap finish. The basement has no 220 wiring. the cabinets are 1890 - 1900 vintage" and so on to the end of this paragraph.

D. VALUATION OF 1684 WALNUT STREET

On page 7 of his brief, the Appellant deals specifically with this property and these sections of his brief are the last portions of the brief to which the Board must apply the tests as to the appropriateness of his brief as a brief. The printed text from its inception to and including "insulation" in the fifth line of the fourth paragraph is appropriate brief material. The next sentence from "the...about 15,000..." inclusive has no evidence to support it and is therefore inappropriate. The rest of the text from "even...and longest" is appropriate. The balance of the paragraph, not being supported by the evidence before the Board, is inappropriate. The rest of the submissions are appropriate.

APPENDIX "B"

To: Nova Scotia Municipal Board

NOTES BY APPELLANT
REGARDING ASSESSMENT APPEALS ON:

1684 WALNUT STREET, HALIFAX
1239 SOUTH PARK STREET, HALIFAX
5640 FENWICK STREET, HALIFAX
5651-53 FENWICK STREET, HALIFAX

Appellant: Donald J. Cummings
1684 Walnut Street
Halifax, Nova Scotia

August 23, 1985

Donald J. [illegible]
1684 Walnut Street
Halifax, Nova Scotia
B3H 3[illegible]

August 23, 1985

Nova Scotia Municipal Board
[illegible]
PO Box 1587
Halifax, Nova Scotia
B3J [illegible]

Attention: Mr. Richard [illegible]

Gentlemen and Lady:

Please find herewith written observations by the undersigned regarding the agreement [illegible] referred to on the [illegible], invited by the Board at the [illegible] hearing into this matter. I hope [illegible] some value to you in reaching [illegible].

Yours sincerely,

Donald J. [illegible]

DJC/mp

CONTENTS

Page

Letter of Transmittal

Table of Contents

Brief Review 1

15% Reduction-in-value Rule for Multi-unit Properties 1

Income Approach to Valuation 3

Comparison of 1984 Assessments with Adjusted Sale Prices as of Jan.1, 1983 5

Subject Properties, General Remarks 5

1684 Walnut Street 7

1289 South Park Street 8

5649 Fenwick Street 9

5651-53 Fenwick Street 10

Summary and Conclusions 11

Appendices

Appendix 1: List of Comparable Properties

2: Tables Showing Reductions Made by Assessor in Total Property Values (Land + Building) of some Multi-unit Properties in the Immediate Vicinity of 1684 Walnut Street, Based on the 15% Reduction-in-value Rule for Multi-unit Residential Properties

3: Table Showing Differences Between Sales Values and 1984 Assessment Values for Properties Proposed as Comparables by both Appellant and Assessor

4: Sample Free Market Evaluation Certificates Circulated by Most Real Estate Companies in the Halifax-Dartmouth Area

Appraisal Letter from Canada Permanent Real Estate Company

Trust Agreement regarding 1684 Walnut Street

Brief Review

Reasons for the original appeals to the Municipal Board of the 1985 assessments of the subject properties are detailed in written notes submitted by the Appellant to the hearing of the Board held on July 29,1985. These reasons include items which refer specifically to the particular subject properties (e.g. deteriorated conditions, etc.), but in addition the original notice of appeal cited objection in principle to two standard practices which assessors follow routinely as a matter of general assessment policy. These are:

a) the practice of assessors in making an arbitrary 15% reduction in the assessed value of properties simply because they contain more than one unit. It is suggested that this results in unfairly high assessed values on single family units when compared to similar duplexes or triplexes in the neighborhood.

b) the practice of assessors in employing two different procedures in arriving at real market value for revenue properties, namely, a procedure which determines the value for properties with four units or more based on revenue produced by the property, but determines values for properties of three units or less based on a cost approach to valuation (land + depreciated building cost). It is suggested that this may lead to serious inequities in assessments placed on similar revenue properties.

Since these two items, and in particular item a, are fundamental to the appeal, they will be discussed in some detail below.

15% Reduction-in-value Rule for Multi-unit Properties

During the Municipal Board hearing of July 29, the lawyer representing the Assessor indicated that this practice has been abandoned and is no longer employed by the Assessor in determining values for multi-unit properties. However, on examining the Assessor's valuation report on the two Fenwick Street properties, it was noted that the 15% reduction rule had been applied as a part of the cost approach to valuation for both properties. In an effort to clear up this apparent ~~contradiction and clarify~~ generally information on the 15% reduction rule, the Assessor was contacted by the Appellant and asked the following questions:

When was the 15% rule dropped and who ordered this change in policy?
Why was it dropped?
Is this change in policy reflected in current assessments, that is 1985 assessments, or will it only apply in 1986?
Does the reduction-in-value rule apply elsewhere in the province (e.g. Dartmouth), or is it only applied in the Halifax city assessment region?

The Assessor advised on August 23 that, on the advice of his legal advisor Mr. Duplak, he was not prepared to provide the answers to these questions although the information was known to him. This position on the part of the Assessor and his lawyer would seem to frustrate, in some measure at least, the purpose of the Board in agreeing to receive written submissions, since it is understood that one reason for receiving written submissions was to clarify any points that came to light after a reading by the Appellant of the Assessor's valuation reports. As a consequence of the foregoing, this discussion of the 15% rule will have to be somewhat longer and more cumbersome than might otherwise be required, since it will be necessary to speculate on what actually is the present policy of the Assessment Department on this matter, and to consider various possible policy alternatives.

The position of the Appellant is that the application of an arbitrary 15% reduction to the assessments of multi-unit properties while not applying the same 15% reduction to single unit assessments constitutes an injustice to single unit owners, since it results in single units being assessed relatively too high when compared to their multi-unit neighbours. It is felt that a duplex or triplex of the same size and other characteristics as a comparable single family unit will bring at least as much and probably more on the market as the single family unit, because of their additional kitchen and bathroom facilities and because of the revenue they will generate. This opinion is concurred in by Mr. C.A. MacMichael & Executive Director of the Nova Scotia Real Estate Association, based on his experience over the years with many hundreds of sales in the Metro area. Apparently there has been a recent change of heart on the part of the Assessment Department so that they now also share this opinion, at least in part. It is not clear as to whether the Assessors' present policy is to eliminate the 15% reduction rule for all multi-units, or only for triplexes (the procedure was not used in the valuation report for 1289 South Park St., a triplex). Regardless of what the Assessor's present policy may be, it is contended by the Appellant that the factor should not be used for any multi-units, duplexes as well as triplexes, since the same reasoning which led the Assessor to abandon the practice for triplexes applies with equal or perhaps more force for duplexes as they are generally closer in size and other characteristics to single family units.

It is clear that the 15% reduction-in-value rule was used when the 1984 and '85 assessment rolls were established, and is thus reflected in the assessments of all duplexes and triplexes appearing on those rolls. Examination of Appendix 2, attached to this brief, reveals that the 1985 assessments for fourteen (14) multi-units on Walnut Street were reduced, on average, by approximately $17,300 to give an average assessment for the fourteen multi-unit properties of approximately $97,900. The 1985 assessment for 1684 Walnut Street (subject property) on the other hand is $96,800 but this assessment received no such reduction as did those of the fourteen multi-units mentioned previously. Had the subject property received the benefit of the same 15% reduction in assessment as the fourteen multi-units, its 1985 assessment would have been reduced to approximately $82,300. The affect of applying the 15% reduction to the fourteen multi-units and not to the subject property is to say that on average the fourteen multi-units are worth about the same as the subject property ($97,900 versus $96,800). However, examination of Appendix 2 shows that the average value of the fourteen multi-units is $115,143, whereas the true value of the subject property, according to the

Assessor at least, is $96,500. As a consequence of the assessment procedure employed for the multi-unit properties (15% reduction in assessment), it is contended that an unfairly high proportion of tax burden has been placed on the subject property during the 1984 and 1985 taxation years, and the only practical way to rectify this inequity for these two taxation years is to apply the same 15% reduction to the assessment of the subject property, that is to reduce the assessment of the subject property by approximately $14,500. The ultimate solution to the problem, of course, is to eliminate the 15% reduction-in-value procedure all together, from all properties, but in order to avoid general chaos in the Tax Collector's office this change in policy would have to await the 1986 taxation year. This delay of a general change in policy until the '86 taxation year would also ensure that uniformity of assessment practice is maintained among revenue-producing properties, and thus avoid the inequities that would result for the 1984 and 1985 assessment years by not applying the 15% reduction to revenue properties whose assessments have not yet been finalized for those two years. This last comment relates specifically to 1[illegible] South Park Street, another of the subject properties; the Assessor's valuation report for this property did not apply the 15% reduction to the value he determined by the cost approach, whereas the 15% reduction has been applied to the 1984 and '85 assessments of all other revenue-producing properties as a result of general assessment policy in effect at the time the '84 and '85 assessments were established.

Please refer to Appendix 2 for data relative to the above discussion.

Income Approach to Valuation

The Assessor's valuation reports and his testimony at the July 29th hearing indicate that the income approach to valuation is confined to properties of four(4) units or larger, and is not used for duplexes or triplexes. The Assessor's testimony before the Municipal Board and at an earlier hearing before the Regional Assessment Appeal Court indicated that the income approach will usually produce a lower valuation than the cost approach. Also the Assessor's testimony before these hearings implied that aside from the market data approach where possible, valuations of buildings with four or more units will be confined to the income approach, that is the cost approach will not be used. Thus, aside from market data analysis on an occasional basis, the Assessor's standard procedures for valuation appear to be income approach only for properties of four units or larger, and cost approach only for properties of three units or smaller. This inference by the Appellant is based on the fact that the Assessor always explains relatively lower assessments on four-unit-or-larger properties brought up by the Appellant as comparables by saying that their value was arrived at by the income approach, whereas values for the Appellant's properties (duplexes or triplexes) were arrived arrived at by the cost approach.

The Appellant contends that the above practices by the Assessor will lead to inequities in assessments among small multi-unit revenue properties (six units or less). Assessments for four-unit-or-larger properties will always be relatively lower than for their three-unit-or-smaller counterparts because they were determined, or at least influenced, by the income approach to valuation, while assessments for three-unit-or-smaller properties will always be relatively higher because they were determined, or at least influenced, by the cost approach to valuation.

The Assessor rationalizes his failure to use the income approach for three-unit-or-smaller properties by saying that about two thirds of these are owner-occupied, and it is therefore difficult to get reliable information on revenue since owners tend to give low estimates as to the revenue value of the units which they occupy. He also says that it is difficult to get reliable revenue information even on the units which are rented out. The Assessor's valuation reports indicate that studies by the Assessment Department show that 30% of triplexes are owner-occupied and 33% of duplexes are owner-occupied, but testimony at the July 29th hearing indicates that the samples used in these studies were quite small and did not include all of the duplexes or triplexes in the Halifax area. Furthermore, the Assessor testified that similar analyses were not carried out to determine the proportion of owner-occupation for porperties with four or more units. Since no studies have been done on the four-unit-or-more buildings, he acknowledged that the percentage of owner-occupation in them could conceivably be even greater than it is in three-unit-or-smaller buildings. It is therefore difficult for the Appellant to understand why the dichotomy has been made between four-unit-or-larger and three-unit-or-smaller buildings when deciding whether to use the income approach or the cost approach to valuation.

Regarding the Assessor's reasons outlined above for not using the income approach on three-unit-or-smaller buildings, the Appellant points out that this works an injustice on the approximatley 33% of non-resident landlords which the Assessor says own duplexes and triplexes. If there is any justification for excluding revenue-producing duplexes and triplexes from the income approach to valuation because a large proportion of them are owner-occupied, then surely there is no valid reason for extending this policy to the very significant proportion (33%) of duplexes and triplexes which are non owner-occupied. As to the Assessor's contention that it is difficult to obtain reliable information as to the income of duplexes and triplexes, it is suggested that such information could be obtained by interviews with tennants, affidavits from landlords, or information on file at the Rent Review Commission. Certainly it does not seem to the Appellant that there is much difference between an owner-occupied four-unit building and a non-owner-occupied three-unit building when it comes to deciding whether an income or a cost approach procedure should be used in order to determine a reasonable assessment.

The Appellant suggests that had the income approach been used when determining the assessment for 1289 South Park Street (subject property) the assessment arrived at might have been somewhat lower than is actually the case, and might have been more in line with comparables numbers 8-14 inclusive in the attached Appendix 1. Note that the assessments for all of these comparables are less than for the subject property although they all contain as many, and usually more, units than the subject property. Note also that some of these comparables are assessed substantially below what they recently sold for, so an assumption could be made that this is explained by the fact that their assessments were determined by the income approach rather than market data analysis.

Comparison of 1984 Assessments with Adjusted Sale Prices as of Jan. 1, 1983

The Appellant understands that the Assessment Act requires that 1984 assessments be set at one hundred percent (100%) of market value as of January 1, 1983.

Appendix 3 attached shows 1984 assessments for sixteen (16) properties for which sales data are available. Group 1 properties in this Appendix are comparables proposed by the Appellant for which sales information is available, and Group 2 properties in the Appendix are all of the comparables proposed by the Assessor in his three valuation reports. Examination of the data in Appendix 3 reveals that for the Group 1 properties, 1984 assessments are on average nineteen point eight (19.8%) percent less than adjusted sale price as of January 1, '83 and range as much as 32.5% less than the Jan.1, '83 sales figures. For the Group 2 properties, 1984 assessments are on average 5.0% less than adjusted sale price as of Jan.1 '83 and range as much as 14.7% less than Jan.1 '83 sales figures. Considering all of the properties in both Groups 1 and 2 together, 1984 assessments are on average 10.5% less than adjusted sale price as of Jan.1 '83. See Appendix 3 for an explanation of how these data were determined.

It would appear from the above that 1984 assessments have in general been set at something less than adjusted sales price as of Jan.1 '83, and that the amount of reduction from the Jan.1 '83 sales prices is in the order of 10%. In order to maintain equity with properties in Halifax in general, it follows from the foregoing that valuations for the subject properties determined by the Assessor in his valuation reports, using the market data approach, should be reduced by about 10% when establishing 1984 and 1985 assessments for these properties.

Subject Properties, General Remarks

The four properties whose assessments are under appeal are as follows:

1) 1684 Walnut Street, single family unit occupied by the owner (Appellant);
2) 1289 South Park Street, 3 units, all rented out to tennants at arm's length from the owner;

3) 5649 Fenwick Street, 2 units, both rented to tennants at arm's length from the owner;
4) 5651-53 Fenwick Street, 2 units. One unit is rented to tennants at arm's length from the owner, and the other unit has badly deteriorated or been gutted so that it cannot be rented because of its condition.

Since the appeals of the 1984 assessments on these properties had not been finalized at the time the 1985 assessments were set, the 1985 assessments have been appealed as well so that they too will be subject to the decisions of the Municipal Board with respect to to the '84 appeals.

Each of the four subject properties is discussed later on in this submission, but there are a few general remarks that apply to two or more of them which can be made here. The properties at 1684 Walnut Street and 5649 Fenwick Street both have driveways, but the properties at 1289 South Park Street and 5651-53 Fenwick Street do not have driveways and do not have any accomodation for parking. The driveway at 5649 Fenwick Street can accomodate only one car although the building it serves has two units; the properties which have no driveways, 1289 South Park and 5651-53 Fenwick, have three units and two units respectively. The Assessor in his valuation report has made no allowance for the lack of driveways in subject properties when making adjustments to sale prices of comparable properties. He has made an adjustment to compensate for the difference between paved and unpaved driveways when dealing with comparables, the amount of the adjustment being $250 x 1.72 = $430 (see adjustments, Assessor's valuation report). The Appellant contends that the lack of a driveway or parking accomodation will have a serious detremental effect on the market value of a property, since it reduces substantially the number of potential buyers by those who have cars and prefer an accomodation with parking facilities. It is suggested that the overwhelming majority of potential buyers of the properties at South Park Street and Fenwick Street would be persons who own cars, since the majority of home owners in general own cars. If the Assessor acknowledges that a paved driveway adds value to a property and says that the difference between a paved and an unpaved driveway should be compensated by an adjustment of $430, the Appellant contends that the lack of any driveway at all deserves a much larger adjustment when determining or comparing values of properties. It is suggested that a value of at least $1000 per unit should be used when compensating for lack of driveways, e.g., reduce the value of a triplex by $3000 if it has no driveway or parking accomodation. The Appellant therefore suggests that negative adjustments along the lines suggested above should be made in the Assessor's valuations of the subject properties on South Park Street and Fenwick Street.

1684 Walnut Street

The following is a record of assessment notices that have been received for this property for the years 1984 and 1985

Assessment notice, January 1984	$94,300
Revised assessment notice, February 1984	-
Assessment from Regional Assessment Appeal Court, June 1984	94,300
Assessment notice, January 1985	96,800

This property was discussed in some detail in a written submission to the July 29,1985 hearing of the Board, so the contents of that submission will not be repeated here. However, points made in the earlier submission may be developed or otherwise referred to in the following paragraphs.

The Assessor in his valuation report did not make sufficient allowance for the badly deteriorated condition or obsoleteness of some of the components of the subject property. The Assessor's report indicates that the subject property is in "average" condition, and says that it is in the same condition as one of the Assessor's comparable properties (1673 Chestnut Street). The subject property is in fact in below average condition, and is certainly not in as good condition as 1673 Chestnut Street. The Appellant's earlier written submission indicates that repairs necessary to bring the subject property up to average condition would cost in the order of $8000 to $8500. The Appellant therefore suggests that the depreciation factor of 45% used by the Assessor should be increased to at least 50%.

The much higher assessment of the subject property when compared to the property at 6222 Jubilee Road (Reference no. 6, Appendix 1 attached) is not completely explained by the fact that the Assessor made a $20,000 reduction in the assessment of the Jubilee Road property because it contained urea formaldehyde insulation. The maximum allowance from CMHC for uffi removal is $5000 and insulation contractors advise that the actual cost of doing a uffi removal and repair job on a building similar to 6222 Jubilee Rd. does not usually exceed about $15,000 even if the full $20,000 allowance made by the Assessor is added to the present assessment of the Jubilee Rd. property. This would increase its assessment to only $88,800 - still substantially less than the assessment on the subject property. The subject property and the comparable property (6222Jubilee) are very similar in size and layout, but the comparable property has been maintained in much better condition than the subject property and has extra features such as auxiliary heating by solar panels, etc.

Regarding the relative assessments of the subject property and the comparable property next door (1680 Walnut St.), it would appear from the sales information in Appendix 3 that the comparable is assessed much too high, that its '84 assessment should be about $72,000 if it is accepted that '84 assessments should be about 90% of Jan.1 '83 adjusted sales price (discussed earlier). The Assessor shows a difference in value of about $12,000 between the subject property and 1680 Walnut, and if this difference is accepted then the subject property should be assessed at about $84,000 ($72,000 + $12,000). The property at 1680 Walnut has been proposed as a comparable for the subject property since it is located next door to the subject and since actual sales information is available for this property.

Finally, the Appellant contends that the Assessor's valuation for the subject property should be reduced by the 15% reduction in value that has been applied to neighboring duplexes, and by the 10% assessment/value factor discussed earlier and explained in Appendix 3.

1280 South Park Street

The following is a record of assessment notices that have been received for this property for the years 1984 and 1985

Assessment notice, January 1984	$162,000
Revised assessment notice, February 1984	138,000
Assessment from Regional Assessment Appeal Court, June 1984	138,000
Assessment notice, January 1985	129,200

This property was discussed at some length at the July 29th hearing, and attention is drawn again to a comparison with comparables number 8-14 inclusive in Appendix 1 attached. It would seem that five out of seven of these comparables have more units than the subject property and the other two have the same number of units, and some of the comparables have twice as many units as the subject property. All of the comparables are assessed considerably lower than the subject property, and assessments for some of them are substantially less than would be indicated by the sales data reported in Appendices 1 and 3.

Regarding the Assessor's valuation procedures as discussed in his valuation report for this property, it is suggested that in line with the discussion earlier in this brief, the 15% reduction-in-value rule should be applied to the $151,500 value he determined by the cost approach, and the 10% assessment/value factor should be applied to the $144,000 value he determined by the market data approach. It is also suggested that a value for this property should have been determined by the income approach. Finally, it is suggested that the Assessor's values by whatever method should be reduced by about $3000 to compensate for the fact that this property has no driveway or parking facilities.

An examination of the assessment notice figures above shows that assessments for this property have ranged anywhere from $162,000 in January of '84 to $129,200 in January of '85. The Assessor has explained that the reduction from $162,000 to $138,000 was to allow for the 15% reduction-in-value rule, and the reduction from $138,000 to $129,200 was because he felt on reflection that the depreciation factor that had been used originally was not sufficiently high in light of the condition of the building. Since the Jan. 1985 assessment of $129,200 was set by the Assessor after his October, 1984 inspection of the premises, it is difficult to understand why his valuation report of July 1985 comes up with a value of $144,000 - this value according to the report also being based on the October 1984 inspection.

5649 Fenwick Street

The following is a record of assessment notices that have been received for this property for years 1984 and 1985

Assessment notice, January 1984	$97,700
Revised assessment notice, February 1984	88,200
Assessment from Regional Assessment Appeal Court, June 1984	87,700
Assessment notice, January 1985	83,900
Assessor's valuation (from Valuation Report), July 1985	80,100

The Assessor's final valuation for this property (see above) includes allowances for one working fireplace and one extra set of kitchen cabinets. The building has three fireplaces none of which is functional or capable of being functional. At least one of these is visibly blocked off, and the other two may be blocked off at the flue entrances. In either case, none of the fireplaces has been used during the twenty-five years that the Appellant has owned the property, because of advice from the previous owner and from the Fire Department they are not safe for use. The property was previously owned by antecedents from the Appellant's family, and information from the previous owners is that the unsafe and unused condition of the fireplaces just described has been the case for at least fifty years. The Assessor advises that fireplaces should not be counted in the valuation procedure unless they are functional or capable of being functional, and this is clearly not the case for any of the fireplaces at 5649 Fenwick. Regarding kitchen cabinets, there is one(1) set of modern kitchen cabinets located in the upstairs flat, but the kitchen for the lower flat is in the basement which the Assessor describes as being "low and of cheap finish". This basement kitchen has never been modernized, has no 220 wiring, has old-fashioned taps of a variety which are now used to attach a garden hose to, and has a very old tarnished sink and a very short length of lower cabinets and a few open shelves up top. The cabinets are 1890-1900 vintage and for any potential purchaser would be regarded as a liability rather than an asset, since they would obviously have to be removed and replaced with new cabinets and fixtures that could be regarded as acceptable by today's standards. The Assessor's valuation of this property includes $1542 for a working fireplace ($1482 x 1.10 x 1.72 x 0.55), $495 for an extra set of kitchen cabinets ($475 x 1.10 x 1.72 x 0.55); see Assessor's valuation report for 5649 Fenwick St. The Assessor's final valuation of $80,100 should therefore be reduced by approximately $2000 to adjust for these two items, plus a possible extra $1000 for a driveway that has only one parking space. Note should also be taken that the Assessor's valuation has not yet been reduced by the 10% assessment/value factor discussed earlier.

5651-53 Fenwick Street

The following is a record of assessment notices that have been received for this property for the years 1984 and 1985

Assessment notice, January 1984	$88,300
Revised assessment notice, February 1984	-
Assessment from Regional Assessment Appeal Court, June 1984	80,300
Assessment notice, January 1985	80,300

The Assessor's final valuations for this property, reported in his Valuation Report of July 1985, are $81,100 by the cost approach and $82,000 by the market data approach. His July '85 Valuation Report on this property says on page 14 under the title "Depreciation Explanation 5651-53 Fenwick Street", "The subject home is in below average condition due to the lower flat being completely gutted out, the second floor flat needs some plaster work to the interior walls to repair several cracks, and also there is a water leak in one spot in the basement." Despite the foregoing observation by the Assessor, he includes in his valuation $974 for an extra set of kitchen cabinets and $756 for an extra three-piece bathroom, both of which are presumably located in ~~the~~ "completely gutted out" lower flat. (The Assessor's valuation of the extra set of kitchen cabinets is $1325 x 0.95 x 1.72 x 0.45 = $974; the Assessor's valuation for the extra three-piece bathroom is $1028 x 0.95 x 1.72 x 0.45 = $756.) The kitchen cabinets are of the same archaic variety as described earlier for the lower flat at 5640 Fenwick St., the only difference being that they have a modern kitchen sink and counter top - but the Assessor seems to have made allowance for this elsewhere in his valuation. The kitchen cabinets are a liability not an asset, since they will have to be removed and completely replaced when this flat is restored to a condition where it can be lived in. The bathroom fixtures are also obsolete and will have to be replaced, with the possible exception of the toilet. There are large gaping holes in the walls and ceiling of the bathroom where the plaster is broken and the plumbing exposed. The bathroom will therefore have to be totally renovated with new fixtures and much new plumbing, repairs to floor, walls, and ceiling, before it is restored to a condition that is fit for use. The Assessor's valuations should therefore be reduced by $1730 ($974 + $756) to compensate for the kitchen and bathroom conditions just described.

The very badly deteriorated condition of the lower flat at 5651-53 Fenwick St. was the subject of testimony by both the Assessor and the Appellant at the July 29th hearing of the Board. Briefly, the lower flat is uninhabitable and requires total renovation. Extensive work is required to floors, walls and ceilings in all rooms. Some structural repairs are required (floors in some rooms slant as much as three or four inches from one side to the other), and it is expected that much of the plumbing and wiring will have to be renewed. New fixtures and cabinets will be required for the kitchen and bathroom and many of the light fixtures will have to be replaced. Plaster will have to be replaced in some rooms and repaired in the others, and complete painting and carpeting of floors will be required throughout. It is expected that an expenditure of $25,000 to $35,000 will have to be made in order to bring this flat to a condition where it is acceptable for habitation. The Appellant feels that the Assessor has not allowed a sufficiently large depreciation factor to compensate for the conditions just described, and suggests that the depreciation factor should be increased by at least 5% and possibly 10%. Earlier in this submission it was mentioned that the Assessor reduced the assessment at 6222 Jubilee Rd. by $20,000 to compensate for the fact that the building contained urea formaldehyde insulation. If that amount of reduction, in the case of the Jubilee Rd. property, was warranted, then a much larger reduction in assessment is called for at 5651-53 Fenwick St. since the cost of repairs there will be much greater than at the Jubille Rd. property, and since the poor condition of the subject property will have a substantial negative effect on its potential market value.

The subject property was appraised in March 1984 at a value of $85,000 by Mr. Ernest Eisan, Sales Representative, of Canada Permanent Real Estate. This value would of course have to be adjusted downwards by 1% to 1.5% permonth to arrive at an adjusted market value as of Jan.1 1983. At the July 29th hearing, Mr. Duplak seemed to imply that there was something less than an arm's length relationship between Mr. Eisan and the Appellant, since Canada Permanent had made no charge to the Appellant for their appraisal service. Appendix 4 shows some sample free market appraisal certificates which are circulated by almost all of the larger real estate companies, so the free market appraisal by Canada Permanent is not unusual. On the assumption that the real estate companies offer this free service because they hope that it might ultimately lead to a sale, then if there is any question as to the validity of the appraisal figures determined, it is reasonable to assume that they would tend to err on the high side since a higher appraisal value is more likely to induce an owner to put up his property for sale.

There is no driveway or parking facility at 5651-53 Fenwick Street, and no possibility of obtaining vehicle access to the rear yard for the purpose of setting up parking spaces. All three of the comparable properties proposed by the Assessor in his valuation report for 5651-53 Fenwick St. have driveways, and one of them has a garage, but no downward adjustments in their sale prices have been made by the Assessor to compensate for these facts. In line with discussion earlier in this submission, the Appellant feels that the Assessor's valuations of the subject property should therefore be reduced by at least $2000 to compensate for the lack of parking.

Although the Appellant agrees with the Assessor that the market data approach is generally the best and most reliable method for determining values of properties, it is felt that this is probably not the case for the subject property because of its unique condition (deterioration) and the difficulty in finding comparables in similar condition. It is felt that the cost approach may therefore be the most reliable method of valuation for this property.

Summary and Conclusions

The Appellant feels that the 15% reduction-in-value rule should be applied to the assessment of 1684 Walnut St. in order to bring the assessment on this property into an equitable relationship with the assessments of fourteen (14) duplexes on Walnut St. and many other duplexes all over the city. The Appellant feels that Assessor's valuations on all four of the subject properties arrived at by the market data approach should be reduced by an assessment/value factor of approximately 10% in line with discussion earlier in this submission under the title "Comparison of 1984 Assessments with Adjusted Sale Prices as of Jan.1, 1983". For purposes of conformity with practices of the Assessor, the Appellant in this submission has used a factor of 1% per month when adjusting actual sales figures to a corresponding value as of January 1, 1983; however, it is felt that a factor 1.5% per month may possibly be more appropriate in line with data provided by the Nova Scotia Real Estate Association and discussed in the written notes submitted by the Appellant to the July 29th hearing of the Board. Mr. MacMichael of the Real Estate Association advises that the data contained in his letter of June 22, 1984, which was submitted to the Board earlier, referred to sales in the Halifax metro area.

The Appellant appreciates that it is difficult for the Assessment Department to come up with assessments which are completely equitable on an overall basis, because of the different approaches to valuation and because of differences in weight that different appraisers may assign to various factors that affect the value of property. However, it is felt that the Assessor must strive to produce an assessment roll which will result in the most equitable distribution of tax burden possible, and because of the points mentioned earlier this end has not been accomplished in the case of the four subject properties. After considering the information contained in the three valuation reports prepared by the Assessor, and considering also the points made in this submission and in the written notes submitted by the Appellant to the July 29th hearing of the Board as well as the testimony made to that hearing, The Appellant feels that the maximum assessments that should reasonably be placed on the four subject properties are as follows:

1684 Walnut Street	$ 78,000
1289 South Park Street	$125,000
5649 Fenwick Street	$ 76,000
5651-53 Fenwick Street	$ 70,000

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APPENDICES

APPENDIX 1

LIST OF COMPARABLE PROPERTIES

RE: 1684 Walnut St., Halifax
1289 South Park St., Halifax
5647-49 Fenwick St., Halifax
5651-53 Fenwick St., Halifax

1	2	3	4	5	6	7	8	9
Ref. #	Property Address	Owner	No. Units	Assessments		Sales		Remarks
				1985	1984	Date	Amount	
Subject Properties (owner: Cummings)								
1	1684 Walnut	Cummings	1	96,800	94,300			See #'s 6,7,7A
2	1289 South Park	Cummings	3	129,200	138,000			See #'s 8-14 incl. below
3	5649 Fenwick	Cummings	2	83,900	88,200			
4	5651-53 Fenwick	Cummings	2	80,300	88,300			
Comparable Properties								
5	6214 Jubilee (& 1690 Walnut)*	Redmond	2	93,100	92,100			
6	6222 Jubilee	Brodie	1	68,800	68,800			
7	1636 Walnut	Coady	2	74,500	53,300			
7A	1680 Walnut	Farquhar	1	84,900	84,900	Dec. 84	105,000	
8	1275 South Park	Fram Realty	6	106,200	106,200			
9	1283 South Park	Dow & Duggan	3	126,200	126,200	Apr. 83	143,000	
10	1293 South Park	Curry	5	127,700	127,700			
11	5676-78 Morris	Blackrose	4	116,900	115,900			
12	5639 Fenwick	Tomar	5	108,900	108,900	Jan. 84	156,000	
13	5675-77 Fenwick	Rome	3	125,200	125,200	Aug. 83	187,500	
14	5634-36 Fenwick	Lloyd	5	117,100	117,100	Sept.83	189,500	

Notes:

a) * The property identified above as 6214 Jubilee Rd. is a side-by-side duplex, located on the corner of Jubilee Road and Walnut Street, with one unit facing on Jubilee Rd. (#6214 Jubilee) and the other unit facing on Walnut St. (#1690 Walnut).

b) Comparables no.'s 5, 6, and 7A all abut 1684 Walnut St. (subject property). Comparable no.5 is a duplex and larger than the subject property, whereas comparables no.'s 6 and 7A are single family units.

c) Comparables no.'s 9, 10, and 11 all abut 1289 South Park St. (subject property). Comparables no.'s 10 and 11 both have driveways and parking facilities, whereas 1289 South Park St. does not.

APPENDIX 2

TABLES SHOWING REDUCTIONS MADE BY ASSESSOR IN TOTAL PROPERTY VALUES (LAND + BUILDING) OF SOME MULTI-UNIT PROPERTIES IN THE IMMEDIATE VICINITY OF 1684 WALNUT STREET, BASED ON THE 15% REDUCTION-IN-VALUE RULE FOR MULTI-UNIT RESIDENTIAL PROPERTIES

The following table shows 1985 and 1984 assessments for multi-unit properties located on Walnut Street to the south of the subject property (1684 Walnut). Because of the 15% reduction-in-value rule which the assessor arbitrarily applies to multi-unit residential properties, the 1985 and 1984 assessed values for all of the multi-units listed below are presumably 15% less than the total values for these properties which the assessor would have determined by the cost approach to valuation (land + depreciated building cost). Based on the assessor's advice that he has in fact applied this 15% reduction rule to all the multi-unit properties listed below, Column 6 below has been calculated to show the total value for these properties (land + building) which the assessor would have determined before the 15% reductions were made; Column 6 is therefore equal to the 1985 assessments (Column 4) divided by 0.85. Column 7 shows the amount of corresponding reduction in the total value of each of these properties which the assessor would have to have made in order to arrive at the 1985 assessments.

Calculations for Column 6 and Column 7 are based on 1985 assessed values, but since these values are essentially the same as the 1984 assessment values except for minor differences in two properties, the results would be about the same had the calculations been based on the 1984 assessments.

Calculations for total property values in the table below have been confined to properties on Walnut St. to the south of Jubilee Rd., since at the time the table was being prepared assessment data was not readily available for properties to the north of Jubilee Rd.

1	2	3	4	5	6	7
Property Address	Owner	No. Units	Assessments		Total Ppty. Value (Land + Building)	15% Reduction in Tot. Value (Col.6 x 15%)
			1985	1984		
1684 Walnut (subject property)	Cummings	1	96,800	94,300	96,800	NIL
1562-64 Walnut	Moore Est.	2	108,800	108,800	128,000	19,200
1568-70 Walnut	Migas	2	102,700	102,700	120,824	18,124
1572-74 Walnut	Polychronopoulos	2	104,200	104,200	122,588	18,388
1578-80 Walnut	Dorcie	2	108,800	108,800	128,000	19,200
1594 Walnut	Phelan	2	85,700	85,700	100,824	15,123
1600 Walnut	Sabowitz	2	95,100	95,100	111,882	16,782
1636 Walnut	Coady	2	74,500	74,500	87,647	13,147
1650 Walnut	Walker	2	87,200	83,500	102,588	15,388
1670-72 Walnut	Dert. Transmiss.	2	85,500	85,500	100,588	15,088
1617-19 Walnut	Rowden	2	100,700	100,700	118,471	17,771
1631-33 Walnut	Berard	2	104,400	104,400	122,823	18,423
1637-39 Walnut	Cromwell	2	111,200	111,200	130,823	19,623
1679-81 Walnut	Rodger	2	108,300	108,300	127,412	19,112
6214 Jubilee (&1690 Walnut)*	Redmond	2	93,100	92,100	109,529	16,429
Averages (Multi-unit properties above)			97,871	-	115,143	17,271

SUMMARY:	Multi-units above	1684 Walnut(subject)
AVERAGE 1985 ASSESSMENT	97,871	96,800
AVERAGE TOTAL PROPERTY VALUE(LAND + BUILDING)	115,143	96,800
AVERAGE ARBITRARY REDUCTION IN TOT. PROPERTY VALUE	17,271	ZERO

APPENDIX 3

TABLE SHOWING DIFFERENCES BETWEEN SALES VALUES AND 1984 ASSESSMENT VALUES FOR PROPERTIES PROPOSED AS COMPARABLES BY BOTH APPELLANT AND ASSESSOR

The following table shows a comparison between 1984 assessments and actual sales data for properties proposed as comparables by both the Appellant and the Assessor. Properties proposed by the Appellant as comparable to the subject properties are shown below as Group 1, and properties proposed by the Assessor as comparable to the subject properties are shown as Group 2. All of the properties in Group 2 have been taken from the Assessor's valuation reports on the subject properties, namely, 1684 Walnut Street, 1289 South Park Street, 5649 Fenwick Street, and 5651-53 Fenwick Street. Sales data are available for all of the properties shown in both Groups 1 and 2; these actual sales data have been adjusted in Column 7 below to total property values as of January 1, 1983 using the method and the factor employed by the Assessor in all three of his valuation reports. Thus, the actual amount received for each property has been adjusted by 1% per month to determine a total property value as of Jan. 1 '83. Column 8 below shows the difference between the 1984 assessment for each property and its adjusted sales value as of Jan.1 '83; thus, Column 8 equals Column 7 less Column 4.

Although it is understood that 1984 assessments are supposed to be equal to market values of properties as of Jan.1'83, an examination of the data below shows that in almost all cases the 1984 assessments are LESS than the total property values as of Jan.1 '83. For Group 1 the discrepancies range as high as $56,292 and average $27,727. For Group 2 (the Assessor's comparables) the discrepancies range as high as $15,900 and average $4837. In other words, these discrepancies indicate that 1984 assessments for Group 1 have been established at values which are on average about $27,700 less than the Jan.1 '83 market value of these properties; similarly, Group 2 assessments have on average been established at values approximately $4800 less than the Jan.1 '83 real market values would indicate.

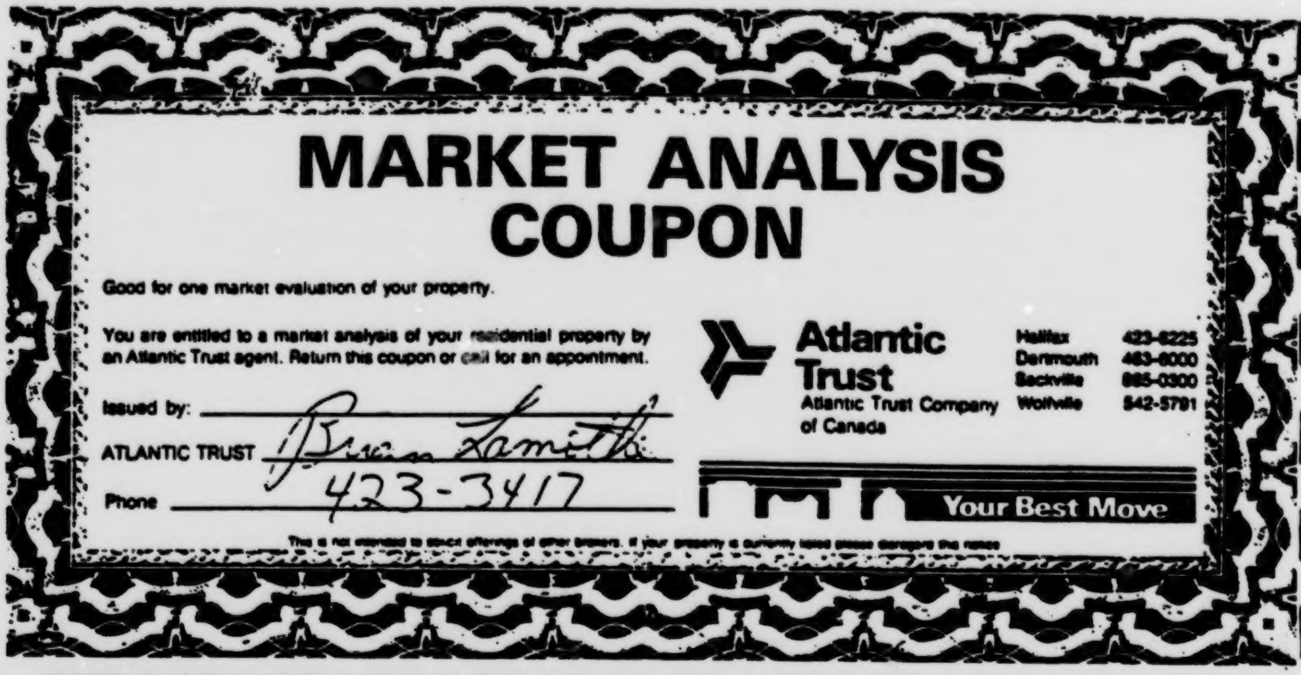
1	2	3	4	5	6	7	8
Property Address	No. Units	Assessments		Sales		Adj. Sale Price - Jan.1/83	Diff:-Adj. Sale Less '84 Asses (Col7 less Col4
		1985	1984	Date	Amount		
Group 1 Comparable Properties from Appendix 1 this brief:							
1680 Walnut	1	84,900	84,900	Dec.20/84	105,000	80,325	- 4,575
1233 South Park	3	126,200	126,200	Apr.25/83	143000	137,280	+11,080
5639 Fenwick	5	108,900	108,900	Jan./84	156,000	136,500	+27,600
5675-77 Fenwick	3	125,200	125,200	Aug./83	187,500	173,437	+48,237
5634-36 Fenwick	5	117,100	117,100	Sept./83	189,500	173,392	+56,292
Averages		-	112,460	-	156,200	140,187	+27,727
Group 2 Comparable Properties from Assessor's Valuation Reports:							
1876 Walnut	1	75,000	75,000	May 13/83	81,000	77,760	+ 2,760
1848 Garden	1	92,200	92,200	June 30/83	115,000	108,100	+15,900
1673 Chestnut	1	89,600	89,600	Aug.11/83	99,000	91,080	+ 1,480
1283 South Park	3	126,200	126,200	Apr.25/83	143,000	137,280	+11,080
1673-77 Larch	3	118,600	118,600	Dec.29/82	125,000	125,000	+ 6,400
1596-98 Robie	3	102,400	102,400	Sept./83	125,000	113,750	+11,350
1870 Seldon	2	68,900	68,900	May 18/83	70,000	67,550	- 1,350
1139 Wellington	2	68,200	68,200	Feb.28/83	68,500	67,130	- 1,070
6255 Jubilee	2	83,800	83,800	Sept.30/82	90,000	92,700	+ 8,900
5307-09 South	3	103,300	103,300	Jan.28/83	105,000	105,000	+ 1,700
6311-13 York	2	97,800	93,700	Sept.29/82	90,000	92,700	- 1,000
6169-71 Shirley	2	85,600	85,600	Dec.15/82	87,500	87,500	+ 1,900
Averages		-	92,292	-	99,917	97,129	+ 4,837

AVERAGE 1984 ASSESSMENT AS A PERCENT OF
AVERAGE ADJUSTED SALE PRICE AT JAN.1,1983

Group 1 above............80.2%
Group 2 above............95.0%
Groups 1 and 2 combined..89.5%

APPENDIX L

SAMPLE FREE MARKET EVALUATION CERTIFICATES CIRCULATED BY MOST REAL ESTATE COMPANIES IN THE HALIFAX-DARTMOUTH AREA



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Good for one market evaluation of your property.

You are entitled to a market analysis of your residential property by an Atlantic Trust agent. Return this coupon or call for an appointment.

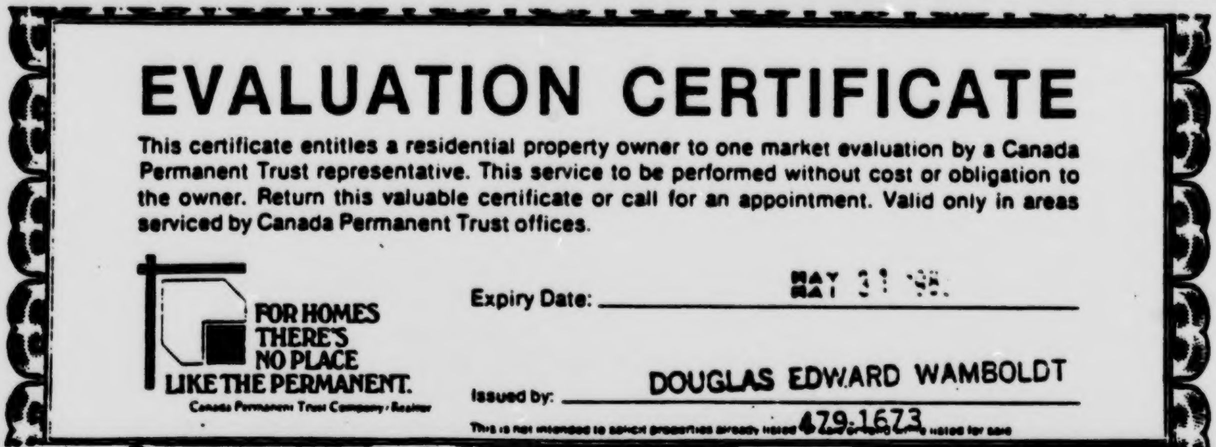
Issued by:
ATLANTIC TRUST Brian Lamith
Phone 423-3417

Atlantic Trust
Atlantic Trust Company of Canada

Halifax	423-6225
Dartmouth	463-6000
Sackville	865-0300
Wolfville	542-5791

Your Best Move

This is not intended to solicit offerings of other brokers. If your property is currently listed please disregard this notice



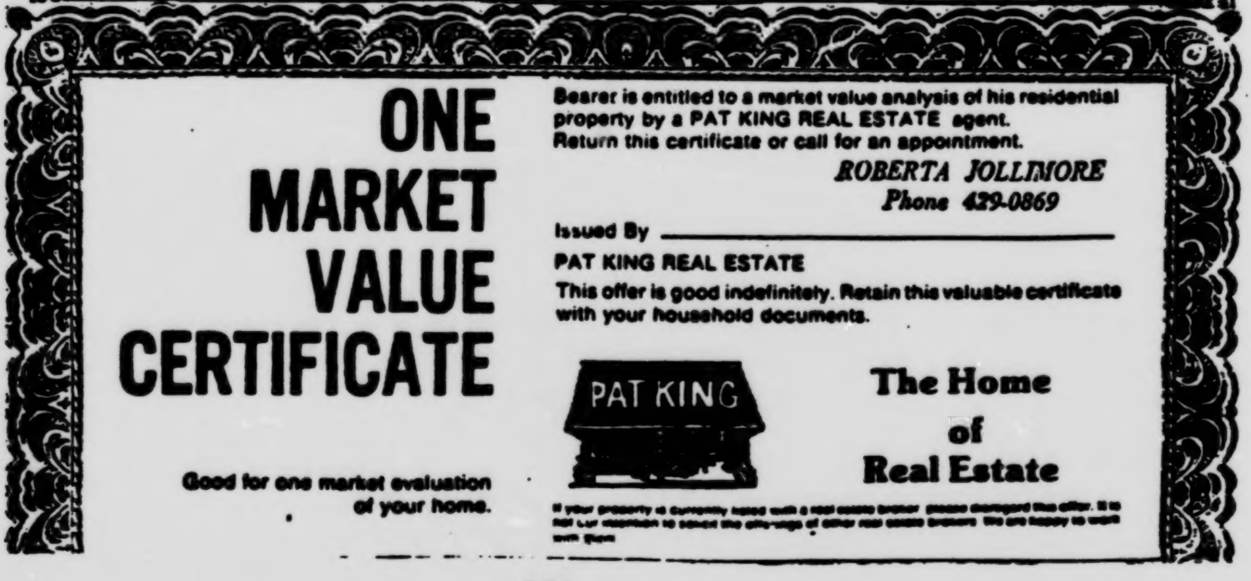
EVALUATION CERTIFICATE

This certificate entitles a residential property owner to one market evaluation by a Canada Permanent Trust representative. This service to be performed without cost or obligation to the owner. Return this valuable certificate or call for an appointment. Valid only in areas serviced by Canada Permanent Trust offices.

FOR HOMES THERE'S NO PLACE LIKE THE PERMANENT.
Canada Permanent Trust Company • Realtor

Expiry Date: MAY 31 '85
MAI 31 '85

Issued by: DOUGLAS EDWARD WAMBOLDT
479-1673



ONE MARKET VALUE CERTIFICATE

Good for one market evaluation of your home.

Bearer is entitled to a market value analysis of his residential property by a PAT KING REAL ESTATE agent.
Return this certificate or call for an appointment.

ROBERTA JOLLIMORE
Phone 429-0869

Issued By
PAT KING REAL ESTATE

This offer is good indefinitely. Retain this valuable certificate with your household documents.

PAT KING

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The Permanent

Real Estate Division
Canada Permanent Trust Company/Realtor

Suite #114, Tower 1,
Halifax Shopping Centre,
7001 Mumford Road,
Halifax, Nova Scotia B3L 4N8

(902) 422-8454

June 18, 1984

Mr. Donald Cummings
1684 Walnut Street
Halifax, Nova Scotia

Dear Mr. Cummings:

Re: 5647 - 49 & 5651 - 53 Fenwick Street, Halifax, Nova Scotia

In accordance with your request, I have inspected the above noted properties for the purpose of estimating their cash market value.

Date of Inspection and Appraisal - March 27, 1984.

Market Value

Having personally inspected the subject properties and taking into account all known relevant factors such as: square footage, condition of dwelling, which are in need of work and some renovations, size of lot, zoning and services available, and taking into account market value of dwellings in the area of larger size and in good condition, it is my opinion that the subject properties have a market value as of March 27, 1984 in the following amounts:

5647 - 49 Fenwick Street - $98,000 (Ninety Eight Thousand Dollars)

5651 - 53 Fenwick Street - $85,000 (Eighty Five Thousand Dollars)

Market value of 5651 - 53 increase to $100,000, provided downstairs work is completed.

This is to certify that I have no interest in purchasing subject properties for my own personal use.

Respectively yours,

THE PERMANENT REAL ESTATE

Ernest M. Eisan
Sales Representative

[redacted]

24th **THIS AGREEMENT** made this day of July in the year of Our Lord one thousand nine hundred and fifty-six.

BETWEEN:

DONALD CUMMINGS of Halifax in the County of Halifax, Province of Nova Scotia, hereinafter called the "TRUSTEE"

of the ONE PART

-and-

MARGARET CUMMINGS, **BARBARA CUMMINGS**, **RUTH CUMMINGS** and **JOAN CUMMINGS**, hereinafter called the "OWNERS"

of the OTHER PART.

WHEREAS by Indenture of even date herewith MARGARET CUMMINGS and THE CANADA PERMANENT TRUST COMPANY, Executors and Trustees of the last will and testament of Elizabeth Cummings, deceased, and all the children of the said Elizabeth Cummings, conveyed to DONALD CUMMINGS the property No. 94 Walnut Street in the City of Halifax and more particularly described in the said Indenture, IN TRUST for the following uses and purposes:-

FIRST: To hold the property as TRUSTEE for all the children of the late Elizabeth Cummings share and share alike;

SECOND: That such of the children of the said Elizabeth Cummings, deceased, as shall reside in the said dwelling No. 94 Walnut Street shall have the said property free of rent provided however that they will pay all taxes, insurance, upkeep and any other expenses in connection with the maintenance of the said property;

THIRD: That if at any time any one or more of the children of the said Elizabeth Cummings, deceased, desires to obtain their share of the property in cash, then upon being given one year's notice of their desire to obtain his or her share, the TRUSTEE will arrange that those who desire to hold the property will pay off the share or shares of the ones applying to obtain his or her share in cash, and the value of such share shall be decided by an appraisement to be made by a recognized real estate agent in the City of Halifax;

FOURTH: That if the TRUSTEE is not able to pay off the share or shares of any of those applying for same, then the TRUSTEE shall arrange for a sale of the said property as soon as convenient and divide the proceeds thereof equally between all the parties to this agreement.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

SIGNED SEALED AND DELIVERED
In the presence of:

J A Walker

Donald J. Cummings
Margaret Cummings
Barbara Cummings

J A Walker

Ruth Cummings
Jean E. Cummings

PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX
HALIFAX SS

On this 7th day of ~~July~~ Aug A.D.1956, before me, the subscriber, personally came and appeared J. A. WALKER, a subscribing witness to the foregoing Indenture, who, having been by me duly sworn, made oath and said that DONALD CUMMINGS, MARGARET CUMMINGS, RUTH CUMMINGS and JOAN CUMMINGS, four of the parties thereto, signed, sealed and delivered the same in his presence.

Bernard Black

A Commissioner of the Supreme Court
of Nova Scotia.

CANADA
PROVINCE OF QUEBEC
MONTREAL SS

I Frederick William Strong

A Commissioner for taking affidavits
In the Province of Quebec for use in
the Province of Nova Scotia
and having no official seal.

a ~~Notary Public in and for the Province of Quebec~~, duly authorized and commissioned, residing and practising at MONTREAL in the Province of Quebec, DO HEREBY CERTIFY that on this 2nd day of ~~July~~ August A.D.1956, before me, the subscriber, personally came and appeared Kathleen Wilde a subscribing witness to the foregoing Indenture, who, having been by me duly sworn, made oath and said that BARBARA CUMMINGS, one of the parties thereto, signed, sealed and delivered the same in her presence.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my ~~Notarial~~ S. Seal of Office at Montreal in the Province of Quebec this 2nd day of ~~July~~ August A.D.1956.

A Commissioner for taking affidavits
In the Province of Quebec for use in
the Province of Nova Scotia
and having no official seal.
My appointment expires.

~~NOTARY PUBL~~IC, PROVINCE OF QUEBEC.

5

Manchester Properties Limited v. Director of Assessment

ASSESSMENT--BUSINESS OCCUPANCY--RATE TO BE APPLIED--WHETHER OCCUPANCY FOR THE PURPOSES OF A RESTAURANT--ASSESSMENT ACT, SS. 7(2),(5), 25B(1), 89(1)(a)

This is an appeal by Manchester Properties Ltd. from the portion of a decision of the Dartmouth Regional Assessment Appeal Court which confirmed the 1983 commercial assessment of $895,000.00 for 16 Portland St. and appeals by the Director of Assessment and the City of Dartmouth from the portion of that decision which granted an exemption for business occupancy under s. 25B(1) of the Assessment Act in respect of that portion of 16 Portland St. known as The Billy Club. The Board on March 19, 1985 had determined that the commercial assessment of 16 Portland St. was $740,000.00 and that The Billy Club was not exempt from business occupancy assessment. The present hearing was to determine the business occupancy assessment for 16 Portland St. The property at 16 Portland St. was occupied by Manchester, The Billy Club, the Police Association of Nova Scotia (P.A.N.S.) and Anson Developments Ltd.

HELD: The business occupancy assessments of Manchester, P.A.N.S. and The Billy Club should be calculated at 50% of their assessed values. The Board awards Manchester 60% of its costs taxed against the Director and the Director 100% of its costs related to the business occupancy appeal taxed against The Billy Club, both on a party and party basis on the County Court scale.

All parties agree that the business occupancy assessments of Manchester and P.A.N.S. should be calculated at 50% of their assessed values. Anson Developments was not assessed for business occupancy for 1983. The Board is doubtful it can exercise its discretion to determine business occupancy for Anson and in any event is not prepared to do so on appeals by Manchester, the Director and the City. In respect of The Billy Club, it argues that business occupancy should be calculated at 25% of assessed value under s. 7(2)(a)(ii) because it occupies the property for the purposes of a restaurant. The entire property occupied by The Billy Club, however, is not used exclusively as a restaurant. In order for property to qualify as a restaurant pursuant to s. 7(2)(a) it must be used or occupied primarily (more than 50% of the time) for restaurant purposes. While the part of The Billy Club known as Sherlock's is used exclusively for restaurant purposes, the lounge is used for restaurant purposes less than 50% of the time the premises are available to members. There is also a games room. When the overall activity of The Billy Club is considered, the property occupied by it does not qualify to have business occupancy assessment calculated at 25% instead of 50% on the basis of use as a restaurant.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14 as amended;

- and -

IN THE MATTER OF: An Appeal by **MANCHESTER PROPERTIES LTD.** from a decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region;

- and -

IN THE MATTER OF: Appeals by the **DIRECTOR OF ASSESSMENT** and the **CITY OF DARTMOUTH** from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH SALTON (formerly ELIZABETH LAWRENCE), Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: BRUCE W. EVANS, LL.B., for Manchester Properties Ltd. and The Billy Club;

RANDALL DUPLAK, LL.B., for the Director of Assessment;

LOUANNE LABELLE, LL.B., for the City of Dartmouth.

DECISION

By Notice of Appeal dated September 23, 1983, received by the Board on September 23, 1983, the Appellant, **MANCHESTER PROPERTIES LTD.** (hereinafter referred to as Manchester) appealed the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region, made August 24, 1983, respecting that portion of the decision which confirmed the 1983 commercial assessment of $895,000.00 for the property known as Civic No. 16 Portland Street, Dartmouth, Nova Scotia.

By Notice of Appeal dated September 19, 1983, received by the Board on September 19, 1983, the Appellant, Director of Assessment (hereinafter referred to as Director) appealed that portion of the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region, made August 24, 1983, which granted The Billy Club exemption under Section 25B(1) of the Assessment Act for business occupancy assessment for 1983 with respect to a part of the property known as Civic No. 16 Portland Street, Dartmouth, Nova Scotia.

By Notice of Appeal dated September 22, 1983, received by the Board on September 23, 1983, the Appellant, City of Dartmouth, (hereinafter referred to as the City) also appealed that portion of the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region made August 24, 1983 which exempted The Billy Club from business occupancy assessment for 1983 with respect to a part of the property known as Civic No. 16 Portland Street, Dartmouth, Nova Scotia.

In a decision dated March 19, 1985, the Board determined the assessed value of Manchester's commercial property known as Civic No. 16 Portland Street, Dartmouth, to be $740,000.00.

As part of that same decision, the Board determined that The Billy Club, which occupies part of Civic No. 16, Portland Street, was not exempt from business occupancy assessment pursuant to Section 25B(1) of the Assessment Act, R.S.N.S. 1967, c. 14 as amended.

There was insufficient evidence for the Board at the initial hearing of these appeals to enable the Board to determine the 1983 business occupancy assessments for Civic No. 16 Portland Street. The Board ordered that the hearing be reconvened to enable evidence to be adduced on the 1983 business occupancy assessment of 16 Portland Street and on the question of costs, if any, to be awarded.

The reconvened hearing took place on July 17, 1985 in the hearing room of the Nova Scotia Expropriations Compensation Board Room, Centennial Building, Suite 904, 1660 Hollis Street, Halifax, Nova Scotia.

The only person to give evidence at the reconvened hearing was Thomas Mills, N.S.I.A., Senior Assessor for the Dartmouth Assessment Region. Mr. Mills introduced Exhibit M-34, a schedule showing his calculations of the assessed values for purposes of calculating the 1983 business occupancy assessment of properties occupied by Manchester, The Billy Club, The Police Association of Nova Scotia (P.A.N.S.) and Anson Developments Limited, the four occupants of 16 Portland Street.

Mr. Mills calculated the assessed value of the space occupied for the assessment year 1983 as follows:

Manchester	$108,500.00
The Billy Club	$533,617.00
P.A.N.S.	$ 40,416.00
Anson Developments	$ 57,467.00
	$740,000.00

The property occupied by Manchester for purposes of the 1983 business occupancy assessment was the 10,000 square foot paved parking lot and its assessed value was calculated to be $108,500.00 as follows:

Land Value (10,000 sq. ft. x $10.50)	$105,000.00
Pavement (improvement)	3,500.00
Assessed Value of Land (including improvement)	$108,500.00

The rate per square foot of $10.50 for land value and the pavement value of $3,500.00 were determined by the Board at the initial hearing of these appeals and are based on the evidence given by the assessor, Thomas Mills (see pages 26 and 42 of the Board's decision dated March 19, 1985).

The depreciated value of the building and the value of the land occupied by The Billy Club, P.A.N.S. and Anson Developments Limited was calculated by Mr. Mills to be $631,500.00 ($740,000.00 [the commercial assessment of the land and buildings for 1983] - $108,500.00 [the value of the parking lot occupied by Manchester]). Through actual measurements, Mr. Mills calculated the percentage of the building and land occupied by The Billy Club to be 84.5%, by P.A.N.S. to be 6.4% and by Anson Developments Limited to be 9.1%. The assessed value of the space occupied by each was calculated by applying the percentage of area occupied to the assessed value of the total space occupied as follows:

The Billy Club	- 84.5% of $631,500.00 =	$533,617.00
P.A.N.S.	- 6.4% of $631,500.00 =	$ 40,416.00
Anson Developments Limited	- 9.1% of $631,500.00 =	$ 57,467.00
		$631,500.00

Ms. Labelle, Counsel for the City of Dartmouth, and Mr. Evans, Counsel for Manchester, The Billy Club and P.A.N.S., agreed with Mr. Mills' calculations of the assessed values of the areas occupied by Manchester, The Billy Club, P.A.N.S. and Anson Developments Limited.

Anson Developments Limited first occupied property at 16 Portland Street on May 1, 1983. It was never assessed for business occupancy assessment for 1983. It did not receive notice of the initial hearing or of the reconvened hearings of the appeals by Manchester of its 1983 commercial assessment or of the appeals by the Director of Assessment in the City of Dartmouth respecting the 1983 business occupancy assessment of The Billy Club. Anson Developments Limited did not appear and was not represented at either of these hearings.

Section 89(1)(a) of the Assessment Act reads as follows:

> "89(1) On any appeal, the court may
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed".

Section 7(2) of the Assessment Act deals with the computation of business occupancy assessment and it reads as follows:

> "7(2) Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows:
>
> (a) in a sum equal to twenty-five per centum of the assessed value for persons occupying or using property for the purpose of a

(i) service station,

(ii) restaurant,

(iii) hotel or motel licensed under the Hotel Regulations Act,

(iv) campground or trailer park licensed under the Camping Establishments Regulations Act,

(v) motor vehicle dealer licensed under the Motor Vehicle Act,

except that portion of such premises as are licensed under the Liquor Control Act as a cabaret, tavern, beverage room or lounge;

(b) in a sum equal to seventy-five per centum of the assessed value for persons occupying or using property for the purposes of a

(i) bank to which the Bank Act (Canada) applies,

(ii) credit union to which the Credit Union Act applies,

(iii) loan company or investment company to which the Loan Companies Act applies,

(iv) trust company to which the Trust Companies Act applies,

(v) insurance company to which the Insurance Companies Act or the Mutual Insurance Companies Act applies,

(vi) investment dealer or broker to which the Securities Act applies,

(vii) mortgage broker or lender to which the Mortgage Brokers and Lenders Registration Act applies,

(viii) collection agency to which the Collection Agencies Act applies,

and includes any other financial institution of a like nature to those listed immediately above

> whether or not specifically mentioned;
>
> (c) in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

Section 7(5) is also relevant and it reads as follows:

> "7(5) No person shall be assessed in respect of the same premises under more than one of the clauses of subsection (2) and, where any person carries on more than one of the kinds of business mentioned in that subsection on the same premises he shall be assessed by reference to the assessed value of the whole of the premises under that one of those clauses in which is included the kind of business that is the chief or preponderating business of those so carried on by him in or upon such premises."

All parties agree that the properties occupied by Manchester and P.A.N.S. were not mentioned in or excluded from Section 7(2)(a) or Section 7(2)(b) and therefore the business occupancy assessment of the space occupied by Manchester and P.A.N.S. should be calculated pursuant to Section 7(2)(c) at 50% of their assessed values. The Board therefore determines the 1983 business occupancy assessment of Manchester to be $54,300.00 rounded (50% of $108,500.00) and the 1983 business occupancy assessment of P.A.N.S. to be $20,200.00 rounded (50% of $40,416.00).

Because Anson Developments Limited was never assessed for business occupancy assessment for 1983, the Board is doubtful it can exercise its discretion under Section 89(1)(a) and in any event is not prepared to exercise its discretion and determine the 1983 business occupancy assessment for Anson on the appeals by Manchester, the Director and the City.

The remaining issue to be determined is the 1983 business occupancy assessment for The Billy Club. Counsel for the Director and Counsel for the City submit that the business occupancy assessment for The Billy Club should be calculated at 50% of its assessed value pursuant to Section 7(2)(c) of the Assessment Act because The Billy Club does not occupy or use property at 16 Portland Street, Dartmouth, for any of the purposes listed in Sections 7(2)(a) or Section 7(2)(b) of the Act. Counsel for The Billy Club argues that the business occupancy assessment for The Billy Club should be calculated at 25% of its assessed value pursuant to Section 7(2)(a)(ii) because The Billy Club occupies the property at 16 Portland Street for the purposes of a restaurant.

Counsel for the Director and Counsel for the City therefore asked the Board to determine the 1983 business occupancy assessment of The Billy Club to be $266,800.00 rounded (50% of $533,617.00) while Counsel for The Billy Club submits that the 1983 business occupancy assessment should be $133,400.00 rounded (25% of $533,617.00).

Counsel for the Director submits that since there are several activities carried on within the property occupied by The Billy Club, it is necessary to determine the preponderant "business or use" being carried on pursuant to Section 7(5) of the Assessment Act which is set forth at Page 7 of this decision. Counsel for the Director also submits that in order for the business occupancy assessment of The Billy Club to be calculated at 25% of its assessed value pursuant to Section

7(2)(a), The Billy Club must establish that the preponderant use it makes of the property occupied is for the purposes of a restaurant.

Counsel for the Director cites the following extract from Page 57 of the Board's decision of March 19, 1985 - "The Board is of the opinion that the Club's primary activity is the carrying on of a restaurant and lounge business". Counsel for the Director submits that the relevant question to ask in determining the rate to apply for calculation of business occupancy assessment is whether the preponderant use of the property occupied by The Billy Club is the carrying on of a restaurant business or the carrying on of a lounge business.

Counsel for the Director notes that the area occupied by The Billy Club is 15,797 square feet. Of this total, 8,055 square feet or 51% consists of a common area which relates to both uses of the premises as a restaurant and a lounge. Of the remaining 49%, 6% is occupied by Sam Brown's Belt, a small lounge; 10% is used as a games area; 9% is occupied by Sherlocks, a restaurant area; and 24% is occupied by the so-called Billy Club Lounge. Counsel for the Director argues that the restaurant use of The Billy Club Lounge Area is restricted, being used only 25% of the time for restaurant purposes and 75% of the time for other activities.

Counsel for the Director also notes that liquor sales are 60% of total sales and food sales are 40% of total sales and that the ratio of liquor profits to food profits is 1,203%.

Counsel for the Director submits that in terms of hours of operation, percentage of area occupied and amount of sales, the preponderant use of the premises occupied by The Billy Club is the carrying on of a lounge business and not the carrying on of a restaurant business.

Counsel for the City said that the City's main argument on whether The Billy Club was exempt from business occupancy assessment was that the main activity of The Billy Club was of a commercial nature - an eating and drinking establishment. She said that the decision of the Board indicated that the property occupied by the club was used mainly for eating, drinking and dancing but the Board did not give any indication of the predominant use. She submits that the evidence on the hours of operation and the amount of sales does not support the argument that the preponderant use of The Billy Club premises is for restaurant purposes. She further submits that since The Billy Club is not occupying property at 16 Portland Street, Dartmouth, exclusively for purposes of a restaurant, it cannot fall within Section 7(2)(a) and must fall within the general category, Section 7(2)(c), and its business occupancy assessment should be calculated at 50% of its assessed value.

Counsel for The Billy Club argues that the premises occupied by The Billy Club are used for restaurant purposes which is a listed purpose under Section 7(2)(a) and therefore The Billy Club's business occupancy assessment should be calculated at 25% of its assessed value. Counsel for The Billy Club refers to the Board's finding at page 57 of its decision dated March 19, 1985, that The Billy Club's primary activity is the carrying on of a restaurant and lounge business.

Counsel for The Billy Club argues that the Director and the City are trying to have it both ways by arguing that for purposes of determining whether The Billy Club is assessable for business occupancy, its primary activity is that of a restaurant and lounge business but for purposes of determining the rates to be applied in calculating the amount of business occupancy assessment, The Billy Club is a private club and not a restaurant.

Counsel for The Billy Club also refers to the Board's finding at page 46 of its decision of March 19, 1985, that The Billy Club is licensed by the Nova Scotia Liquor License Board as a private club. He submits that the argument of the Director and the City that the premises occupied by The Billy Club are used predominantly for a lounge business is irrelevent because The Billy Club is licensed as a private club and not licensed as a cabaret, lounge, tavern or beverage room. Counsel for The Billy Club referred to Section 7(2)(a) which is quoted on pages 5 and 6 of this decision and specifically the exception part of that subsection.

Counsel for The Billy Club argued that food and liquor are sold in restaurants and that the intent of the Legislature in enacting Section 7(2)(a) was that a restaurant where food and liquor are sold is to be assessed at 25% of its assessed value except for those parts of the premises which are licensed as a cabaret, lounge, tavern or beverage room. Counsel for The Billy Club submits that The Billy Club is licensed as a private club and therefore does not fall within the exception.

Counsel for The Billy Club also submits that there is no evidence that more than one kind of business is being conducted on the premises occupied by The Billy Club. He says there are different activities which take place on the premises but not different kinds of businesses. He submits that Section 7(5), quoted at page 7 of this decision is intended to cover the situation where someone is carrying on more than one business on the same property. He further submits that Section 7(5) makes it clear that the preponderant business is used for determining the rate to apply to calculate business occupancy assessment. He submits that the Board has already made a finding that The Billy Club is operating a restaurant and lounge business. He submits that food and liquor are sold together on all parts of the property occupied by The Billy Club and there is only one restaurant and lounge business.

Counsel for The Billy Club further submits that it is not relevant whether The Billy Club makes more profit off liquor sales than food sales to determine if it qualifies as a restaurant under Section 7(2)(a). He also submits that nothing turns on the amount of square footage occupied for food sales and liquor sales in determining the use of the premises. Counsel for The Billy Club also submits that in determining the use of the premises for business occupancy assessment purposes it is not necessary to identify all the activities being carried on and then pick the primary activity as being the predominant use for business occupancy assessment purposes.

In rebuttal, Counsel for the Director submits that

The Billy Club is licensed under the Liquor Control Act as a private club and it is incorporated under the Society's Act as a private club. Therefore, he argues that The Billy Club is a private club and not a restaurant. Counsel for the Director submits that because The Billy Club is using the premises as a private club, it is not a restaurant and since it is not a restaurant it does not fall within any of the headings listed in Section 7(2)(a).

In rebuttal, Counsel for the City argues that the Board must make a determination under Section 7(2)(a) on whether the premises occupied by The Billy Club are used as a restaurant or not. She submits that the premises are not used as a restaurant just because they are licensed as a private club and not licensed as a tavern, beverage room, cabaret or lounge. Counsel for the City further argues that the Liquor Control Act provides for an eating establishment license, which most restaurants have, which permit the sale of liquor in restaurants provided the restaurant maintains a certain percentage of food sales to liquor sales. Counsel for the City also stated that a restaurant can have a lounge license but for a different portion of the premises than occupied by the restaurant.

Counsel for the City states that a restaurant is a place where food is served and the main activity is the serving of food on the premises. She submits that when the overall operation of The Billy Club was considered, it cannot be said that the main activity on The Billy Club premises is the serving of food and therefore the premises are not used as a restaurant.

In order for The Billy Club's business occupancy assessment to be calculated at 25% of the assessed value of the property occupied, it must use or occupy the premises for restaurant purposes.

Restaurant has been defined in the Compact Edition of the Oxford English Dictionary as: "an establishment where refreshments or meals may be obtained".

The property occupied by The Billy Club is used for several activities including the sale of prepared meals, the sale of alcoholic beverages, dancing, and the viewing of movies. The property also includes a games room featuring a pool table, dart boards and video games. At times, a portion of the property is let for a private function such as a wedding reception.

Portions of the property occupied by The Billy Club are designated for certain uses, for example, Sam Brown's Belt is used exclusively as a quiet lounge; Sherlock's is used exclusively as a restaurant; and the games room is a recreation area. The area known as The Billy Club lounge is used for several activities including lunches five days a week; dinner on Fridays; and brunch on Sundays. It is also used during the evenings for showing movies, playing cards and dancing.

The entire property occupied by The Billy Club is not used exclusively as a restaurant. However, parts of the property are used for restaurant purposes. Sherlock's is used exclusively for restaurant purposes; however, The Billy Club lounge is used for restaurant purposes less than 50% of the time the club's premises are available to members. At times, The Billy Club lounge area is not used for any purpose.

The Billy Club is licensed as a private club pursuant to the provisions of the Liquor Control Act and incorporated as a society pursuant to the provisions of the Societies Act.

In its decision dated March 19, 1985, the Board made a finding that The Billy Club was not a non-profit organization and further, that the main activity of The Billy Club was the operation of a restaurant and lounge business.

In the opinion of the Board, in order for property to qualify as a restaurant pursuant to Section 7(2)(a) of the Assessment Act, it must be used or occupied primarily (more than 50% of the time) for restaurant purposes.

In the opinion of the Board, when the overall activity of The Billy Club is considered, the property occupied by The Billy Club does not qualify to have its 1983 Business Occupancy Assessment calculated at 25% of assessed value of the property occupied. The Board calculates The Billy Club's Business Occupancy Assessment for 1983 to be $266,800.00 rounded (50% of $533,617.00).

Manchester was successful in its appeal of the decision of the Regional Assessment Appeal Court respecting the 1983 commercial assessment of its property known as 16 Portland Street, Dartmouth. The Director of Assessment was successful in its appeal of the decision of the Regional Assessment Appeal Court respecting the 1983 business occupancy assessment of The Billy Club which occupies a large part of 16 Portland Street. The Billy Club is the majority owner of the shares of Manchester.

The two appeals were joined and heard at the same time. The appeal relating to the commercial assessment of the property owned by Manchester was more involved and required more time and preparation to present than the appeal relating to the business occupancy assessment of The Billy Club. Although Manchester was successful in reducing the commercial assessment of its property, the Board did not rely upon much of the evidence presented by Manchester's expert appraiser.

The City of Dartmouth also filed an appeal respecting the 1983 business occupancy assessment of The Billy Club. However, counsel for the Director was mainly responsible for the carriage of the appeal.

The Board awards Manchester 60% of its costs to be taxed against the Director on a party and party basis on the County Court scale by Arthur Hare, Q.C., of Halifax.

The Board awards the Director 100% of its costs related to the appeal concerning the business occupancy assessment of The Billy Club, to be taxed against The Billy Club on a party and party basis on the County Court scale by Arthur Hare, Q.C., of Halifax.

The Board does not make any award of costs in favour of or against the City of Dartmouth.

An Order will issue accordingly.

Dated at Halifax, N.S., this 27th day of March, 1986.

RH Blois

R.H. Blois, Chairman

EA Salton

Elizabeth Salton, Vice-Chairman

Darryl Wilson

Darryl Wilson, Member

National Sea Products Limited v. Director of Assessment

ASSESSMENT--COMMERCIAL AND BUSINESS OCCUPANCY--MARKET VALUE--COST APPROACH--PHYSICAL DEPRECIATION, FUNCTIONAL OBSOLESCENCE AND ECONOMIC OBSOLESCENCE--ESTIMATES SUBJECTIVE--MORE EXPERIENCED AND QUALIFIED APPRAISER/ASSESSOR PREFERRED--WHETHER PIPES AND DUCTS PART OF BUILDING--FUNCTIONAL TEST--ASSESSMENT ACT, SS. 1(a)(v),(vi), 38, 91(1)(a), 99

This is an appeal from a decision of the Shelburne-Queens Regional Assessment Appeal Court respecting the 1983 commercial and business occupancy assessment of the Appellant's fish plant and equipment at Lockport. The total cost of construction of the plant buildings, wharves and site improvements ($11,420,654) was not in dispute. The parties were at variance over the rates of depreciation and obsolescence respecting these items and the allocation of the total cost to five categories: non-assessable costs, manufacturing and processing equipment, wharves, buildings and site improvements.

HELD: The appeal is allowed and costs awarded to the Appellant on a party and party basis on the County Court scale.

In this case the cost approach, and not the income and market data approaches, was the proper one for the determination of value. Regarding the proper rates for depreciation and obsolescence, this determination is a subjective one and not the result of the application of some mathematical formula. Other things being equal, the more experienced and qualified assessor or appraiser is more likely to make a better determination of depreciation and obsolescence. Here the Board should accept the evidence of the Appellant's appraiser over that of the assessor where their evidence is at variance because of his greater experience and higher qualifications. It was also proper for the Appellant's appraiser to consider the results of some fish plant sales which were admittedly not comparable, for the limited purpose only of checking the valuation determined by the cost approach and the range of percentages for depreciation and obsolescence. An amount spent by the Appellant because of site difficulties over what would have been normally required to lay the foundations should be deleted from building costs and is not assessable. Pipes and duct work should be allocated between manufacturing and processing equipment and buildings based on the function served rather than whether they were integrated into the building and were not mobile. Also, the percentage (80.16%) applied to buildings to reflect the general level of assessment should be applied to manufacturing and processing equipment.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14;

- and -

IN THE MATTER OF: An Appeal by **NATIONAL SEA PRODUCTS LIMITED** respecting the commercial land, main plant, equipment, and business occupancy assessments for its property located in the Town of Lockeport.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH A. SALTON, (formerly ELIZABETH LAWRENCE), Vice-Chairman,
DARRYL W. WILSON, C.A., LL.B., Member.

COUNSEL: JOHN S. McFARLANE, LL.B., and ELIZABETH M. HALDANE, LL.B., for the Appellant,

DOUGLAS A. CALDWELL, LL.B., for the Town of Lockeport,

MARIAN F.H. TYSON, LL.B., for the Director of Assessment,

CLYDE A. PAUL, LL.B., for the Board.

DECISION

This is an appeal by **NATIONAL SEA PRODUCTS LIMITED** pursuant to Section 99 of the Assessment Act, R.S.N.S. 1967, c. 14 from the decision of the Regional Assessment Appeal Court, Shelburne-Queens Region dated July 16, 1984, respecting the assessment of the Appellant's plant and equipment located at Lockeport and business occupancy assessment for the year 1983.

The Appellant's Notice of Appeal is dated August 10, 1984, and was received by the Board on August 13, 1984.

The original Notice of Appeal is on file as Exhibit N-1 and sets out the following grounds of appeal:

> "1. THAT the Decision of the Regional Assessment Appeal Court results in an assessment greater than the actual market value of the Appellant's commercial land, main plant, equipment and business occupancy.
>
> 2. THAT in making its Decision as to the amount of the assessment, the Regional Assessment Appeal Court failed to have proper or any regard to the assessment of other properties in the Municipality so as to ensure that the taxation shall fall in a uniform manner on all real property to the Municipality.
>
> 3. THAT the Decision of the Regional Assessment Appeal Court as to the assessment of the Appellant's commercial land, main plant, equipment, business occupancy and other assessments is arbitrary and unsupported by the evidence.
>
> 4. THAT the Regional Assessment Appeal Court in making its Decision as to the assessment of the Appellant's commercial land, main plant, equipment and business occupancy assessments acted on wrong principles of law and contrary to the provisions of the Assessment Act, R.S.N.S. 1967, Chapter 14 and Amendments thereto.
>
> 5. THAT the Regional Assessment Appeal Court improperly applied the provisions of the Assessment Act, R.S.N.S. 1967, Chapter 14 and Amendments thereto.
>
> 6. THAT the Regional Assessment Appeal Court erred in declining to reduce the value of the commercial land, main plant and equipment and the resulting business occupancy assessment of the Appellant's property.
>
> 7. THAT the Regional Assessment Appeal Court erred in calculating the proper amount of depreciation to be taken for functional obsolesence and economic obsolesence of the property and assessments under appeal.

8. THAT the Regional Assessment Appeal Court erred in calculating and classifying expenses incurred in mechanical and electrical contracts for the construction of the building upon the premises appealed from so that certain costs were included in buildings and structures pursuant to Section 1(a)(v) of the Assessment Act rather than in machinery and equipment under Section 1(a)(vi) of the Assessment Act.

9. THAT the Regional Assessment Appeal Court erred in classifying other costs and the rate of depreciation to be taken thereon with regard to the classification of these costs incurred for the property under appeal.

10. THAT the Regional Assessment Appeal Court erred in calculating the amounts of the assessments under appeal in that the excessive costs incurred during construction would not represent market value as defined under the Assessment Act."

The full text of the Regional Court's decision is as follows:

"After considering the evidence presented at the Hearings, the memoranda submitted by the parties and the relevant law, I have come to the following conclusions:

1. The Income Method and the Market Data Method of determining market value are not appropriate methods of determining the market value of an operating fish plant.

2. The appropriate method of determining the market value of the National Sea Products plant at Lockeport, Nova Scotia, is the Depreciated Replacement Cost Method.

3. In applying the Depreciated Replacement Cost Method, it is preferable, in this instance, to use the actual costs rather than costs derived from manuals because the plant was virtually new at the time of the assessment in question.

4. I accept the opinion of the appraiser that 2 percent represents a reasonable deduction for physical deterioration of the

buildings.

5. I accept the submission made on behalf of the Director of Assessment that the assessor's determination of 20 percent economic obsolescence is the maximum amount of economic obsolescence that should be applied to this property and I hereby ratify the application of that figure.

6. In my opinion there was no functional obsolescence in existence at the relevant time and no deduction should be made for same.

7. With respect to items listed on Page 41 of the report of Speed & Speed Limited, my comments are as follows:

(a) Item 2 - Foundations, Sewer and Water: With respect to the $50,000 expended for the purpose of relocating sewer and water lines for the benefit of other users, I am of the opinion that although this sum represented an actual cost of construction of this plant, it was not a "normal cost of construction" and most probably would not be incurred in building a fish plant on a comparable waterfront site. I disagree with the submission made on behalf of the Town of Lockeport to the effect that the sole test is whether the cost in question was an "actual cost" of construction. Therefore, I accept the Appellant's submission that $50,000 is non-assessable.

(b) Items 9 and 12 - Mechanical and Electrical: In my opinion the proper tests are based upon integration and mobility. I have applied these tests and concluded that the piping and wiring in question are fixtures forming part of the fish plant buildings. Therefore no portion is considered non-assessable. The total in each instance is properly included in the building values and is therefore subject to business occupancy assessment.

(c) Item 13 - Refrigeration: There is general agreement that $120,000 was erroneously included in this assessment. I feel it is appropriate to grant the motion made on behalf of the Director of Assessment and I order that two plate freezers be added to the assessment of the cold storage plant in the total amount of $120,000. I do not agree with the Appellant's method of valuing the plate freezers for assessment purposes as outlined on page 17 of Mr. McFarlane's Post Hearing Submission. In other respects, I accept the assessor's figures as to breakdown between "manufacturing and processing" and "buildings" for reasons stated in "(b) Items 9 and 12" herein. No business occupancy is to be assessed respecting the freezers because I do not consider that matter to be part of the motion in question.

(d) Item 14 - Production Equipment - Non Contract: I have concluded that the items in question totalling $124,905 are integral parts of the production process and are assessable as machinery and equipment.

(e) Item 17 - Site Work: I consider the full sum to be assessable as Site Improvements. I am not convinced that the construction of storm drains on this property was other than a normal cost of construction on this site or on a comparable waterfront site. The value of this improvement is over and above the basic land value as computed by the assessor.

(f) Item 21 - Fork Lift, Boxes, etc.: With respect to the $180,515, I consider this to be assessable as machinery and equipment for the reason stated in "(d) Item 14" above.

(g) Item 24 - Engineering Design and Supervision: In accordance with the approach I applied to "(a) Item 2" herein, I have concluded that $20,955 (30 percent of $69,851) should be allocated to re-routing the pre-existing site services and considered non-assessable.

I consider Mr. Speed's estimate, that 5 percent of the total cost was directly related to manufacturing and processing rather than to building, to be a fair and reasonable estimate under the circumstances. Therefore, I would move $34,926 from the assessor's "buildings" category to be "manufacturing and processing equipment" category. The net result is that no business occupancy will be assessed in relation to same. I do not consider this issue to be similar to that addressed in "(b) Items 9 and 12" herein.

In all other respects, I would ratify the valuations and allocations applied by the assessor concerning this item.

(h) Item 26 - Dredging: I consider the cost of dredging to be a normal cost of construction of the wharves and therefore assessable as such. The Appellant did not in my opinion present evidence from which I could ascertain what part of the dredging costs, if any, were considered excessive costs.

(i) Item 27 - Interest During Construction: I would ratify the approach taken by the assessor. However, adjustments will have to be made to reflect the changes in assessable values determined herein.

(j) Item 28 - Excessive Cost of Foundation: For reasons stated in "(a) Item 2" herein, because these costs would not normally be incurred on a comparable waterfront site, I do not feel that they should be included when determining market value. I accept the evidence presented by the Appellant on this matter.

8. With respect to Business Occupancy Assessment, I agree with the submission on behalf of the Director of Assessment to the effect that all the assessable commercial property, except wharves (and related wharf costs) and that portion of the manufacturing and processing equipment considered independent of the buildings, is assessable for business occupancy.

9. I accept the submission of the Director of Assessment that the fish processing lines are assessable as manufacturing and processing equipment, not as a portion of the buildings. Therefore no business occupancy tax will apply to same.

10. In all other respects I confirm the assessment presented by the assessor.

APPEAL ALLOWED IN PART

"W. YORKE TUTTY"
W. Yorke Tutty
Chairman
Shelburne - Queens Regional
Assessment Appeal Court"

With the consent of the Town of Lockeport and the Director of Assessment, the hearing of the appeal took place in the Expropriations Compensation Board Room in Halifax commencing on November 19, 1984. Counsel for the Director and Counsel for the Town of Lockeport indicated to the Board that they had no objection to the Board assuming jurisdiction to hear the appeal on the merits.

The Board after stating that it would assume jurisdiction and hear the appeal on the merits requested Counsel to make opening statements.

Counsel for the Appellant stated that there was agreement among the parties to the appeal as to the cost of constructing the plant but there was a disagreement as to the proper level of depreciation to be applied to this cost. He stated the proper allocation of the total costs to machinery and equipment on the one hand and building on the other hand was in issue. He stated that the general level of assessment should be applied in determining the assessment of the machinery and equipment as well as the land and building. This was also in issue. He indicated that a further issue arises with respect to certain costs incurred by the Appellant at the time of the plant's construction which costs did not result in the Appellant earning a return. He cited examples of moving water supply lines and excess costs of foundation and drilling. As a final matter he stated that "the Appellant is somewhat uncertain as to where the Town boundary lies...". This issue related to the question as to whether or not the Appellant's plant lies within the boundaries of the Town of Lockeport or partly in the Town and partly in the adjacent municipality or in "no man's land".

He indicated that high water mark "cuts through the plant".

After some discussion of the boundary question by counsel, counsel for the Appellant stated that "...perhaps I have some resolution to this matter. The Appellant has, I have talked to the Appellant and I think we can say that for the purpose of this appeal, and for the 1983 assessment, the Appellant is willing to admit that the property under assessment and under appeal lies within the boundary of the Town of Lockeport and that the findings of this Board with regard to assessment will then be properly entered upon the assessment roll for the Town of Lockeport. The only caveat I give to that admission is that the Appellant reserves the right in future years and in future assessments to make an argument as to jurisdiction if it so wishes, but for the purpose of this appeal for the 1983 assessment year, the Appellant is agreeable to the assessment being properly made by the Town of Lockeport."

Counsel for the Director and for the Town agreed with the submission of the Appellant and the Board proceeded to hear evidence on the question of valuation on the understanding that all the parties represented at the hearing have agreed that for the purpose of the 1983 assessment, the property of the Appellant lies wholly within the Town of Lockeport.

The Appellant called as its first witness Oliver P. O'Rourke, the Treasurer of the Appellant corporation. He has been employed by the Appellant since February of 1980. He is a professional engineer graduating from TUNS in 1962. He also holds the degree of Master of Business Administration from McGill University, obtained in 1968. His work experience involves employment in various capacities (both engineering and finance) with a number of corporations before joining National Sea. He also was employed with Government for four years.

Mr. O'Rourke outlined his duties and responsibilities as Treasurer of the Appellant Company which involve economic analysis, the raising and spending of money, calculations on the return on investment and the return on shareholders' equity. He explained that the company's head office was in Halifax where financial policy matters were determined and the Company's accountant located in Lockeport kept the Lockeport plant's day-to-day accounting records. He stated that the head office of the Company was responsible for determining the results of the Lockeport plant operations through the use of a centralized computer system with the computer located in head office.

Mr. O'Rourke stated that a fire in July of 1980 destroyed the company's old plant in operation at that time. A few days after the fire he and other senior officers of the company including the President went to Lockeport to view the damage and to talk to the plant's employees. He described the fire as being a "major disaster" to the Company and its employees.

Mr. O'Rourke stated that after the fire his company estimated the cost of constructing a new plant in the range of 12 - 14 million dollars which included the reconstruction of the fish meal plant. He stated that the company was only willing at that time to invest the fire insurance proceeds of approximately 3.1 million dollars in the new plant. He indicated that shortly after the fire the company filed a proposal with DREE seeking financial assistance towards the cost of rebuilding.

In its determination of how much money the company was prepared to invest towards the cost of a new plant Mr. O'Rourke stated the company would normally be looking for a 20% return on its investment after taxes. In this situation which he described as a hardship one he stated that the company's officers were prepared to recommend to the company's directors a 15% rate of return on investment and he stated that a 15% rate of return would support a figure of 3.1 million dollars.

In addition to supplying information to DREE about the Lockeport situation Mr. O'Rourke said that this information was given to the Provincial Department of Development. He indicated that the company's financial position at the time was in a down-turn.

Mr. O'Rourke stated that the company's first approach to DREE was based on a plant capacity of 40,000,000 lbs. of fish a year but later it made another submission to DREE with respect to a 25,000,000 lb. capacity plant. DREE subsequently made an offer of assistance to the Appellant on February 18, 1981, which was not acceptable to the Appellant. Another DREE offer on April 10, 1981, was acceptable to the Appellant. This offer is set out in a letter dated April 10, 1981 from DREE to the Appellant indicating that the offer "is in respect of the proposed new facility for the processing of fresh, frozen and salted groundfish at Lockeport." The amount of the development incentive from DREE was estimated to be $3,088,525.00 and included the sum of $502,000.00 for the creation of 251 jobs.

Mr. O'Rourke testified that the Province of Nova Scotia provided the Appellant with a job-creation grant of $8,000.00 per job up to a maximum amount of $2,400,000.00. He said that the total estimated cost of construction was $11,394,000.00 and the "final figures came in very close to that figure". Of the total cost of construction, 7.6 million dollars was paid with government funding and the balance was paid by National Sea. Of the 7.6 million dollars, $1,250,000.00 represented a loan from the Province of Nova Scotia. In Mr. O'Rourke's opinion the Lockeport plant would not have been rebuilt if government funding had not been available. He stated that after the reconstruction the plant resumed commercial production at the end of 1982 and the company suffered losses at the Lockeport plant for the years 1983 and 1984. He said that the net loss to the company relating to the Lockeport plant was $1,365,000.00 for 11 months of 1984 which was based on costs including allocated costs of $838,000.00 as shown on Exhibit N-6. He said that the loss for 1984 without the inclusion of the allocated costs was $527,000.00 ($1,365,000.00 - $838,000.00). In 1983 the loss for the Lockeport plant was $565,000.00. He defined the allocated costs as a portion of the head office costs for insurance, administration, computer and other costs chargeable to the Lockeport operation.

Mr. O'Rourke briefly explained the system of fish quotas and the sources of fish brought to the Lockeport plant for production. National Sea obtains most of its fish for the Lockeport plant from a fishing zone designated 4X which is a large area shown on the map filed as Exhibit N-7. Cod and haddock quotas are the company's main quotas in the 4X area. In 1983 the Appellant's quotas in 4X were 2,827,000 lbs. for cod and 6,952,000 lbs. for haddock. He stated the Appellant realized only 55% of the cod quota and 57% of the haddock quota in 1983. He said that in 1983 the Lockeport plant processed about 21 million lbs. of fish of which 13,637,000 lbs. represented National Sea landings in Lockeport from all fishing areas shown on N-7. He said the remaining 7,000,000 lbs. came from local inshore fishermen.

On cross-examination by Counsel for the Town of Lockeport Mr. O'Rourke acknowledged that while the Lockeport plant processes under 25 million lbs. of fish annually it has the capacity to process 60 million lbs. per year. Mr. O'Rourke was referred to page 3 of the Appellant's information submission to DREE (Exhibit N-11) which states in part that "Federal Fisheries have projected a substantial increase in the Canadian share of groundfish TAC (total allowable catch) from 1980 to 1985. As a result, there is a deficiency in processing capability of the Canadian industry on a year round basis. This, of course, also applies to National Sea Products. The increased processing capability of the proposed Lockeport facility helps to remedy this situation".

The Appellant's total catch for all areas had been increasing up to 1983 and in that year its sales were the highest ever. Mr. O'Rourke testified that the Appellant's total catch for 1982 was 354,200,000 lbs; for 1983, 314,600,000 lbs and for 1984 to the end of November 312,841,000 lbs. He stated that the net book value of the Lockeport assets for 1983 was $5,217,621.00 and for 1984 it was $5,000,669.00. He could not give the figure for 1982. Mr. O'Rourke acknowledged on cross-examination that the Lockeport plant is in an excellent location for a fish plant for eight reasons which are listed on page 1 of the Appellant's submission to DREE. These reasons are as follows:

> "1. An excellent work force is available;
>
> 2. Land is available although extensive wharf reconstruction is necessary;
>
> 3. An excellent supply of fresh and salt water is available through systems owned by the Province of Nova Scotia;
>
> 4. A municipal sewer system is in place;
>
> 5. The existing cold storage, with a 2,000,000 pound capacity, can become an integral part of the proposed facility;
>
> 6. A good supply of inshore fish is available from fishermen who are continuing to sell their fish to National Sea Products;
>
> 7. The proposed facility can be supplied by trawler diversions that are surplus to the requirements of the Lunenburg plant;

8. An adequate supply of electric power is available from the Nova Scotia Power Corporation."

Mr. O'Rourke agreed that the Lockeport plant is one of the most modern fish plants owned by the Appellant.

On cross-examination by counsel for the Director, Mr. O'Rourke testified that the insured value of the Lockeport plant and equipment for 1982 was $12,000,000.00.

The next witness to testify for the Appellant was Arthur Speed an accredited real estate appraiser since 1960 whose qualifications and experience are outlined in Exhibit N-8. The Board accepted Mr. Speed as a person qualified to give opinion evidence on real estate valuation. Mr. Speed prepared an appraisal report filed as Exhibit N-2 and a supplementary appraisal report filed as Exhibit N-9. He stated that his report excluded the Appellant's cold storage plant which is under a separate assessment. He also excluded the manufacturing and processing equipment in the subject plant and stated that this equipment was appraised by Earle P. Kaiser on behalf of the Appellant.

Mr. Speed's report includes a certification on page 1 which states in part:

> "that in our opinion the Market Value of the Land, Site Improvements, Wharves and Buildings as of December 31, 1982, was in the order of $2,756,000 as follows

Land & Site Improvements	$ 217,000
Wharves	613,300

Buildings (excluding Cold Storage)	1,925,700
TOTAL	$2,756,000
1983 Level of Assessment	80.16%
1983 Value for Assessment Purposes of Land, Site Improvements and Buildings (excluding Machinery & Equipment and the Cold Storage Buildings) before Business Occupancy computation	$2,209,200"

The Speed report indicates that the subject site is irregular in shape and contains approximately 76,575 sq. ft. The site is serviced with municipal sewer and fresh water lines and also with a salt water supply line. It is zoned M-1, Industrial General.

The Lockeport plant comprises six buildings referred to by both Mr. Speed and the Assessor, P.G. Comeau as buildings A, B, C, D, E and F.

BUILDING A consists of the processing building which has four levels. Level 1(a) is where the salt fish processing takes place, 1(b) is a refrigerated storage area; Level 2 contains the processing plant on the main level, Level 3 contains the office level located over the salt fish processing area, Level 4 is on the second floor over the processing plant and contains a cafeteria, kitchen, laundry, locker rooms and dry storage. Building A contains a floor area of 65,528 sq. ft.

BUILDING B is a one level concrete block building containing the holding room located at the junction between Buildings A and C. It contains 12,500 sq. ft.

BUILDING C is an unloading shed and contains 9,370 sq. ft.

It is a one storey steel frame structure with a flat roof built on a concrete wharf deck.

BUILDING D is a two storey building containing the boiler room, lockers and washrooms, a compressor room, a dewatering area. It contains 5,634 sq. ft. of floor area.

BUILDING E is a two-storey ice house containing 4,483 sq. ft.

BUILDING F is a one-storey meal plant containing 6,804 sq. ft.

The six buildings contain a total of 104,319 sq. ft. of floor area.

There are three wharves forming part of the overall complex having a total area of 33,679 sq. ft.

The main processing building was built in 1982 and has poured concrete walls and footings and has a steel frame. It is heated by a steam boiler located in building D and is air conditioned. It also has a sprinkler system. There is a 6,000 lb. capacity freight elevator which stops at three levels, the salt fish level, the processing level and the storage level.

Mr. Speed's report in setting out the site data and building size summary appears to be identical in that respect to the data set out in Mr. Comeau's report filed as Exhibit N-4.

Mr. Speed at page 52 of his report (N-2) sets out the total actual costs of construction of the plant including the costs of the demolition of the old meal plant and the interest charges during construction. This total cost was obtained from the Appellant and is in the amount of $11,420,654 and is broken down into 25 separate categories. The same total cost figure is shown in Mr. Comeau's report at page 20A.

Mr. Speed's report then shows in column 2 of page 52 those costs which he considers as non-assessable. These total $1,289,091. Mr. Comeau in his report shows non assessable costs in the total amount of $356,833. They are in agreement with respect to non-assessable costs with regard to five items namely:

Wharves and foundations	$ 65,000.
Refrigeration equipment	20,000.
Demolition - old meal plant	27,086.
Move propane	1,830.
General expense	110,532.
	$224,448.

Mr. Speed included the following items as non-assessable:

Item 2	Foundations, sewer & water	$ 50,000.
Item 17	Site work	45,920.
Item 19	Office furnishings, vehicles, fish pans, shelving, plastic fish boxes etc.	174,515.
Item 22	Eng. design supervision	69,851.
Item 24	Dredging	22,599.
Item 25	Excess cost of foundations	635,237.
		$998,122.

Mr. Comeau in his list of non-assessable costs showed $75,718. for item No. 19 and $56,667. for item No. 25.

It will thus be seen that Mr. Speed's total of non-assessable costs exceeds Mr. Comeau's total by $832,258. ($1,289,091. - $356,833.).

Mr. Speed then allocates $3,844,352. of the total costs of construction and property acquisition costs to manufacturing and processing equipment while Mr. Comeau only allocates $2,227,689 to this category.

Mr. Speed allocates $1,471,989 of the total costs of construction and property acquisition costs to wharves while Mr. Comeau allocates $1,384,794. to this category.

Mr. Speed allocates $4,621,774. of the total cost of construction and property acquisition costs to buildings while Mr. Comeau allocates $7,221,782. to this category.

Finally, Mr. Speed allocates $193,448. of the total costs to site improvements while Mr. Comeau allocates $229,556. to this category.

The following is a copy of page 52 of Mr. Speed's report showing his allocations of the agreed total costs of $11,420,654 and following that are Mr. Speed's "Notes on Distribution of Construction Costs" set out on pages 53-60 inclusive of Mr. Speed's report. Following Mr. Speed's "Notes on Distribution of Construction Costs" is a copy of Mr. Speed's "Depreciated Replacement Cost Summary" found on page 61 of his report.

NEW CONSTRUCTION AND PROPERTY ACQUISITION COSTS

	TOTAL COSTS	NON ACCESSABLE	MANUFACTURING & PROCESSING EQUIPMENT	WHARVES	BUILDINGS	SITE IMPROVEMENTS
Wharves & Foundations	$ 1,611,925	$ 65,000		$1,250,000	$ 284,425	$ 12,500
Foundations, sewer & water	443,037	50,000			383,804	9,233
Structural Steel Buildings A-B	480;514				480,514	
Refrigeration Alteration	38,937	20,000	$ 18,937			
Structural Steel Buildings C-D-E-F	294,654				294,654	
Rooves	252,419				252,419	
Cladding & Ceiling - Salt Fish area	459,841				459,841	
Architectural Contract	1,293,961		25,000		1,268,961	
Mechanical	1,070,534		435,000*		635,534	
Elevator	90,030				90,030	
Sprinklers	171,411				171,411	
Electrical	715,893		472,000*		243,893	
Refrigeration	804,922		764,676		40,246	
Production Equipment - Non Contract	961,741		961,741			
Production Equipment - Contract	530,603		530;603			
Meal Plant Renovation & Equipment	137,668		137,668			
Site Work	63,477	45,920				17,557
Demolition Old Meal Plant and Equipment	121,293	27,086	94,207			
Office furnishings; vehicles; fish pans, shelving, plastic fish boxes etc.	345,728	174,515	171,213			
Move Propane	1,830	1,830				
General Expense	110,532	110,532				
Eng. Design - Supervision	698,514	69,851	34,926	146,030	412,781	34,926
Paving of Parking lot	109,249					109,249
Dredging	22,599	22,599				
Excess Cost Of Foundations		635,237			(635,237)	
Construction Costs Before interest Charges	$10,831,312	$1,222,570	$3,645,971	$1,396,030	$4,383.276	$ 183,465
Interest During Construction	$ 589,342	$ 62,521	$ 198,381	$ 75.959	$ 238.498	$ 9,983
	$11,420,654	$1,285,091	$3,844,352	$1,471,989	$4,621,774	$ 193,448

NOTES ON DISTRIBUTION OF CONSTRUCTION COSTS

Item

1. $65,000 Non Assessable item was for demolition of old wharves.

$12,500 Site improvements represents change orders relating to the sewer contract.

Wharves cost as noted.

$284,425 Building amount represents part of foundation costs.

2. $383,804 Buildings amount represents part of foundation costs.

$50,000 represents cost of rerouting existing on site water and sewer lines which are owned by the Town of Lockeport and Province of Nova Scotia and pass underneath the buildings and through the plant property, serving other users along the Harbour Front.

The remaining $9,233 represents the cost of extending laterals to the Processing plant from the mains.

3. As noted.

4. $20,000 Non Assessable item represents temporary costs of servicing cold storage building after the fire.

$18,937 represents the purchase of a backup compressor.

5,6,
7 As noted.

8. National Sea Products acted as their own General Contractor. 'Architectural Contract' was the name given the account for miscellaneous contracts eg. C. Blk. walls, ceilings, hardware, etc.; all associated with the buildings construction. Included in this amount was the balance of the foundation costs; of which $25,000 is for additional foundations to support equipment shown under Manufacturing and Processing Equipment

9. $435,000 of the Mechanical Contract relates to the Manufacturing and Processing function, and is additional to the mechanical items necessary for the functioning of the building in the amount of $635,534.

The production equipment in this section which is clearly 'mobile' and does not form any part of the building includes the following items -

Item 9 (Cont'd)

1. The stainless steel ducting on the pan washer.
2. The 400 H.P. boiler to generate steam for fish meal production.
3. The deaerator.
4. The oil tanks, pumps, fittings, gauges and meters.
5. The piping, valves and gauges on the fish meal cookers.
6. The sea water piping, valves and fittings on equipment.
7. The fresh water piping valves and fittings on equipment.
8. The high pressure cleaning pumps, and tanks.
9. The foaming units used to wash equipment.

These items represent $200,000 of the $435,000 identified as Production Equipment. The balance of $235,000 represents supporting mechanical items necessary for the operation of the Production Equipment, which does not form part of the building.

The cost of Mechanical services as noted, were broken down as follows between production and non production by the Contractor and accepted for Federal and Provincial Sales Tax purposes (Manufacturing and Processing Equipment tax exempt) as follows -

TAXES AND DUTIES

(a) Federal Sales Tax

Production

The Contractor is hereby advised that, in the opinion of the Owner, the following equipment and/or goods specified in this contract, is to be used as outlined in Schedule III, Part XIII, Sections 1,3,4 of the Excise Tax (Production Equipment)

Compressors, Controls and Compressor Room Equipment
Condensors
Boilers and Boiler Room Equipment
Fish Meal and Offal Equipment
Ice Making Equipment
Fish Processing Equipment
Chilling Equipment
Maintenance Equipment
High Pressure Cleaning Equipment
Sanitizing Equipment
Process Hot Water
Steam Lines To Fish Meal Plant
Heat Tracing Production Water Lines
Battery Chargers
Welding Plugs
Packaging Conveyor
Power Panels For Above
Plate Freezers
Any other Production Equipment

Item 9 (Cont'd)

Therefore, the mechanical material associated with the above equipment would be Federal Sales Tax Exempt. The Contractor is hereby advised to exclude from his tender all Federal Sales Taxes on the above parts of the Contract.

Should it be ruled at a later date that any Federal Sales Tax is payable on the above parts of the contract, the Owner shall be responsible to pay such amounts in addition to the contract price.

Buildings (Non Production)

The Contractor is hereby advised that, in the opinion of the Owner the following equipment and/or goods is taxable and Federal Sales Tax taxes shall be paid on the mechanical material associated with it included in the lump sum tender price (Non-Production Equipment)

Inside and Outside Lighting, Panels, etc.
Office wiring and Wall Receptacles
Telephone System
Heating
Ventilation
Air Conditioning
Sprinkler System
Sanitary Hot Water
Time Clocks and Alarms
Door Operators and Heaters
Diesel Oil Pump for Boats
Boat Shore Power
Elevator
Any Other Building Services or Non-Production Equipment.

10,
11, As noted.

12. $472,000 of the Electrical Contract relates to the Manufacturing and Processing function, and is additional to the Electrical items necessary for the functioning of the building in the amount of $243,893.

The production equipment in this section which is clearly 'mobile' and does not form any part of the building included the following items -

1. The microprocessor.
2. The starters and controls for the compressors, ammonia pumps, condenser fans and pumps.
3. The starters and controls for the offal dewatering and conveying system.
4. The starters and controls for the fish meal dryers, conveyors, grinder, bagger, odour control, pumps, etc.
5. The starters and controls for the unloading conveyors, sorting tables, redfish scaler, etc.

Item 12 (Cont'd)

6. The starters and controls for the boiler, deaerator, boiler feed pumps, etc.
7. The battery chargers for fork lift trucks.
8. The disconnects for all filleting, skinning, trimming, packing equipment, etc.
9. The starters and controls for the ice makers, ice handling equipment, etc.

These items represent $250,000 of the $472,000 identified as Production Equipment. The balance of $222,000 represents supporting electrical items necessary for the operation of the Production Equipment, which does not form part of the building.

The cost of Electrical services as noted, were broken down as follows between production and non production and accepted for Federal and Provincial Sales Tax purposes (Manufacturing and Processing equipment tax exempt) as follows -

TAXES AND DUTIES

(a) Federal Sales Tax

The Contractor is hereby advised that, in the opinion of the Owner, the following equipment and /or goods specified in this contract is to be used as outlined in Schedule III, Part XIII, Sections 1,3,4 of the Excise Tax (Production Equipment).

Compressors, Controls and Compressor Room Equipment
Condensors
Boilers and Boiler Room Equipment
Fish Meal and Offal Equipment
Ice Making Equipment
Fish Processing Equipment
Chilling Equipment
Maintenance Equipment
High Pressure Cleaning Equipment
Sanitizing Equipment
Process Hot Water
Heat Tracing Production Water Lines
Battery Chargers
Welding Plugs
Packaging Conveyor
Power Panels for Above
Plate Freezers
Any Other Production Equipment

Therefore, the electrical material associated with the above equipment would be Federal Sales Tax Exempt. The Contractor is hereby advised to exclude from his tender all Federal Sales Taxes on the above parts of the contract.

Item 12 (Cont'd)

Should it be ruled at a later date that any Federal Sales Tax is payable on the above parts of the contract, the Owner shall be responsible to pay such amount in addition to the Contract price.

The Contractor is hereby advised that, in the opinion of the Owner the following equipment and/or goods is taxable and Federal Sales Tax shall be paid on the electrical material associated with it included in the lump sum tender price. (Non-Production Equipment).

Inside and Outside Lighting, Panels, etc.
Office Wiring and Wall Receptacles
Telephone System
Ventilation and Heating
Air Conditioning
Sprinkler System
Sanitary Hot Water
Time Clocks and Alarms
Door Operators and Heaters
Diesel Oil Pump for Boats
Boat Shore Power
Elevators
Any Other Building Services or Non- Production Equipment.

13. 95% of the refrigeration equipment in the amount of $764,676 are "non integrated" pieces of machinery and equipment which can be removed without affecting the building. They include the following components -

    8 compressors (one of which is the $18,937 agreed to be processing equipment in item 4)
    2 condensors
    1 intercooler
    1 ammonia surge tank
    1 water tank for condensors
    2 pilot receivers
    3 ammonia pumps
    4 chilling units
    2 ice makers
    1 ice blower
    1 ice blower after cooler
    1 ice rake
    1 non condensible gas purger
    2 water pumps

    These items are all of value when they are removed from the plant and could be reused, without alteration, in another plant.

14. As noted.

15. As noted.

16. $137,668 represents the cost of renovation of salvagable equipment in the meal plant, and purchase of new equipment.

17. $63,477 is made up of -

$17,557 Site Fencing

$45,920 Cost of constructing storm drains around the site. This in included in the land value estimate of $1.15 per sq.ft.

18. $27,086 is the demolition cost of the old meal plant.

$94,207 - same note as item 16 above.

19. $174,515 non assessable represents the cost of office furnishings and vehicles, as follows -

Office furnishings and equipment		$ 75,718
Vehicles -		
Fork Lift	$ 28,039	
Fork Lift	8,060	
Toyota Trucks Fork Lifts	58,990	
Pallet Trucks Fork Lifts	3,582	
Charger	126	98,797
		$174,515

20,21. As noted.

22. $698,514 Engineering Design & Supervision costs paid to Engineering Service Company Limited - Time allocation as follows -

(a)	Dredging and attendant items	$34,925	
	Soundings	13,971	$ 48,896
	Relocation of existing site services		20,955
	Dredging & Soundings are operating expenses. Relocation work does not increase capital value. Therefore, not assessable.		$ 69,851
(b)	Manufacturing & Processing Equipment		$ 34,926
(c)	Wharves - design cost	$91,463	
	- supervision cost	54,567	$146,030
(d)	Buildings - design cost	$258,537	
	- supervision cost	154,244	$412,781
(e)	Site drainage design & supervision	$ 25,000	
	Paving & site work supervision	9,926	$ 34,926
			$698,514

23. As noted.

24. This dredging item is an operating expense.

25. Excess Cost of Foundation.

The extra foundation costs of this job were caused by a combination of extraordinary conditions including -

(a) Very irregular and difficult to blast rock in the area of Building B and part of Building A.

(b) Bog like material under the remainder of Building A which required special dewatering, removal and replacement.

(c) Excavations and construction adjacent to the existing cold storage building which had to be done in small sections, then stabilized with concrete, then another section, etc., etc. without using blasting.

(d) Buildings D & F had to have their foundations done on a cost plus basis due to working on a site containing a mixture of buried boulders and outcrops, old cribs, old floors, poor fill, etc.

(e) Elevations of existing structures and necessary wharf elevations caused a combination of extra excavation and extra fill.

The additional cost of these foundations over foundation costs under normal site conditions is calculated as follows.

Actual Cost

Total foundation and slab cost for buildings A,B,D, and F (Buildings C and E constructed on wharf deck).

Mosher & Rawding Contract	
1. Footings, foundation walls, part of floor	$ 348,500
2. Trident Construction Contract	391,316
3. Portion of Wharves & Foundations Contract	284,425
	$1,024,241

Normal Cost

Foundations $2.30/sq.ft. gross floor area

Slab $2.00/sq.ft.

$4.30/sq.ft. gross floor area

Gross Floor Area	
Buildings A,B,D, & F 90,466 sq.ft. x $4.30/sq.ft.	$ 389,004
Excess Foundation Cost	$ 635,237

Item 25 (Cont'd)

Note - Base area of buildings A,B,D,F.

A	31,820 sq.ft.
B	12,500
D	4,950
F	6,804
	56,074 sq.ft.

Therefore equivalent costs per sq.ft. of base area of these buildings equals -

Foundations $\frac{90{,}466 \text{ sq.ft.}}{56{,}074 \text{ sq.ft.}} \times \$2.30/\text{sq.ft.} = \$3.71/\text{sq.ft.}$

Slab $\frac{90{,}466 \text{ sq.ft.}}{56{,}074 \text{ sq.ft.}} \times \$2.00/\text{sq.ft.} = \$3.23/\text{sq.ft.}$

$6.94/sq.ft.

Note - Structural floors are additional and contained within the Architectural Contract.

26. The cost of interest charges incurred during construction were capitalized in the amount of $589,342. This amount has been distributed proportionately between the various cost columns as noted on the cost distribution schedule.

DEPRECIATED REPLACEMENT COST SUMMARY

	Replacement Cost	Depreciation & Obsolescence Phys.	 Functional 37.5%	 Economic 33.3%	Depreciate Value
BUILDINGS					
Total Buildings	$4,621,774	---	1,733,165	962,870	1,925,739
Wharves	1,471,989	---	551,996	306,664	613,329
Total Building Structures	$6,093,763	---	2,285,161	1,269,534	2,539,068
LAND					
76,575 sq.ft. @ $1.15 / sq.ft.	$ 88,060	---			88,060
SITE IMPROVEMENTS	193,448	---		64,483	128,965
Total Real Estate	$6,375,271	---	2,285,161	1,334,017	2,756,093
			← 57%	→	
1983 Level of Assessment.					80.16%
1983 Assessment of Land, Site Improvements and Buildings, (excluding Machinery and Equipment, Business Occupancy, and Cold Storage Building)					2,209,284

NOTE 1 Depreciated Value of Buildings $\frac{\$1,925,739}{104,319 \text{ sq.ft.}}$ = $18.46/sq.ft.

Wharves $\frac{\$\ 613,329}{33,679 \text{ sq.ft.}}$ = $18.21/sq.ft.

Parker G. Comeau, a qualified assessor since 1967 testified on behalf of the Director. He has completed the three year course in assessment principles and practices from the Institute of Public Affairs, Dalhousie University. He assessed the subject property for 1983 and he is the author of an appraisal report filed as Exhibit N-4. He handles between 3,500 - 5,000 assessment accounts. He pointed out that fishing is the main industry on Nova Scotia's South Shore where the Lockeport plant is located. He has assessed a number of other fish plants in his region and has inspected fish plants in other regions.

On cross-examination Mr. Comeau stated that he had never taken any courses in the assessment of processing equipment. In his letter of transmittal dated December 12, 1984, he stated that "the market value of the subject property for assessment purposes, for the 1983 assessment year, as of January 1, 1980" was $7,338,008. This figure comprises buildings, sites, wharf and land (commercial real estate) in the amount of $5,667,241. plus manufacturing and processing equipment in the amount of $1,670,767. His figure for business occupancy assessment at 50% is $2,398,470. which figure excludes the value of the wharves. These figures are set forth on page 20-A of Mr. Comeau's report.

At page 23 of Mr. Comeau's report it states that the initial assessment of the subject property was as follows:

"Commercial Real Estate	$ 6,916,700.
Commercial Equipment	2,193,800

Sub-total	9,110,500
Business Occupancy	4,578,000
Grand total	$13,688,500."

These figures were arrived at by the application of Boeckh's Valuation Day Manual. At the time of the assessment the assessor did not have the actual costs of construction. On appeal to the Regional Assessment Appeal Court, the Director having been provided with actual construction costs recommended to the Regional Court the following values:

"Building, site & wharf - Commercial

Real	$ 5,346,555
Attributable to existing frame buildings	57,000
Land	57,000
Sub-total	$ 5,460,555
Processing & Manufacturing Equipment	$ 1,652,017
Sub-total	$ 7,112,572
Business Occupancy 50% (Minus Wharves & equipment excluded by Section 7 of the Act)	$ 2,295,262
Grand total	$ 9,407,834
ROUNDED TO:	$9,408,000"

Both Mr. Speed and Mr. Comeau relied on the reproduction cost less depreciation as the method of determining the value of the plant buildings. Mr. Speed checked the reasonableness of his valuations by means of the market data approach which included sales information about receivership sales which Mr. Speed said should not be ignored. Mr. Comeau was of the opinion that the market data approach was inappropriate in this case because of the lack of comparable sales information concerning fish plants.

The total cost of the Lockeport plant was agreed upon by Mr. Speed and Mr. Comeau. The difference in their conclusions as to valuation for assessment purposes arises out of the fact that they disagreed as to the allocation of these costs to non-assessable items, and manufacturing and processing equipment, wharves, buildings and site improvements. They also were in disagreement as to the determination of physical depreciation and economic obsolescence relating to the buildings. Mr. Speed did not make any allowance for physical depreciation because of the fact that the plant was constructed in 1982 and became operational only a month or so prior to the time of the assessment for the year 1983 and in his opinion there would therefore be no physical depreciation to consider. Mr. Comeau was of the opinion that a 2% depreciation allowance was appropriate, using the depreciation schedules in the Boeckh Manual as a guide.

Mr. Speed was of the opinion that he should depreciate the value of the buildings and wharves by 37.5% because of functional obsolescence. On page 51 of his main report (Exhibit N-2) he states that:

> "Functional inadequacies have been considered in two main respects
> A. The overall design of the plant which does not follow the normal straight-line pattern but was designed to accommodate the elevations of the site and the fixed location of the existing cold storage building which was saved

> from the fire.
>
> B. The plant is designed for an additional line of processing equipment (not installed) which would raise the intake capacity of the plant to 40,000,000 lbs. of fish per annum, compared to existing forecasts in capacity of 25,000,000 lbs. per annum. The existing condition of the industry prohibits this expansion and also the making of any reasonable forecasts as to what point in the future, if ever, this excess plant capacity may be employed."

The combination of these and related factors have resulted in a plant considerably larger than required to service current and future processing requirements."

Mr. Comeau did not see fit to make any allowance for functional obsolescence. He appeared to believe that the plant was a state of the art modern plant and having been recently constructed, there would be no functional obsolescence. Mr. Comeau provided a definition of "functional obsolescence" on page 49 of his report which reads as follows:

> "Loss in value occurring within a structure and caused by inability to adequately perform its intended function. This obsolescence may [illegible] appearance, over-design, out-of-date features such as excessively high ceilings, over-sized rooms, or out-moded structural components compared with modern design and construction."

Both Mr. Speed and Mr. Comeau were of the opinion that there was in fact some economic obsolescence to be considered.

Mr. Speed made an allowance of 33.3% for economic obsolescence while Mr. Comeau considered that [illegible] appropriate rate.

Mr. Comeau states at page 48 of his report that economic obsolescence is "loss in value caused by unfavourable economic influence occurring outside a structure."

It is obvious that the selection of rates for physical depreciation, functional obsolescence and economic obsolescence will have a decided effect upon the final estimate of value. The greater the amount of depreciation and obsolescence allowed for, the lower the value for assessment purposes will be and conversely, the lower the amount of depreciation and obsolescence allowed for, the higher the value becomes.

In this case the parties had the actual total cost of construction of the plant buildings, wharves and site improvements and this cost ($11,420,654.) was not in dispute. Even if the parties were not in dispute as to the proper allocation of these known costs among buildings, wharves, site improvements, non-assessable and processing machinery and equipment, there would still be a considerable gap between the assessment values determined by the assessor and supported by the town of Lockeport on the one hand and the assessment values submitted by Mr. Speed on behalf of the Appellant.

It is the view of the Board that the determination of the proper rates for depreciation and obsolescence is subjective and is not the result of the application of some mathematical formula. Other things being equal, the more experienced and qualified assessor or appraiser is more likely to make a better determination than the assessor or appraiser who is less experienced and less qualified.

In the matter before the Board the Board is of the opinion that it should accept the evidence of Mr. Speed over that of Mr. Comeau where their evidence is at variance because of Mr. Speed's greater experience and higher qualifications. This is not to suggest that Mr. Comeau is not qualified or experienced as an assessor and as a person who can give expert opinions on real property valuation. He is both qualified and experienced but not to the same degree as Mr. Speed. The Board therefore accepts the evidence of Mr. Speed as to his estimates of the rates of depreciation and obsolescence respecting the plant buildings, wharves and site improvements.

Both Mr. Speed and Mr. Comeau carried out an exercise in taking the 25 component parts which make up the total cost of new construction of the plant buildings, wharves, site improvements and processing equipment and allocating these known costs to non assessable costs, manufacturing and processing equipment, wharves, buildings and site improvements. These allocations are set forth on page 20-A of Mr. Comeau's report and page 52 of Mr. Speed's report.

In summary, Mr. Comeau and Mr. Speed allocated the total cost [illegible] $11,420,654. as follows:

	Comeau	Speed
Non assessable	$ 356,833.	$ 1,289,091.
Manufacturing and processing equipment	2,227,689.	3,844,352.
Wharves	1,384,794.	1,471,989.
Buildings	7,221,782.	4,621,774.
Site improvements	229,556.	193,448.
	$11,420,654.	$11,420,654.

It is readily apparent that there is a very great variance in the allocation of most of the costs by Mr. Comeau and Mr. Speed. It is only with respect to costs allocated to wharves and site improvements that their figures are reasonably close.

With respect to the costs allocated to buildings Mr. Speed determined the replacement cost to be $4,621,774 as opposed to Mr. Comeau's figure of $7,221,782. Mr. Speed although he did not allow for any physical depreciation, did allow for 37.5% functional obsolescence and 33.3% economic obsolescence to arrive at the sum of $1,925,739 as the depreciated value of the buildings. Mr. Comeau did allow for 2% physical depreciation using the depreciation schedules in the Boeckh's manual as a guide. Mr. Comeau however did not allow for any functional obsolescence but did apply a 20% allowance for economic obsolescence. In his appraisal report at page 48 Mr. Comeau states his reason for applying a 20% allowance for economic obsolescence as follows: "After careful consideration and deliberation, considering the fact that National Sea had just come on stream approximately 1 month before, all the available lines were not in place, and noting the general condition of the fishing industry at this time, an allowance of 20% for economic obsolescence was allotted".

Mr. Speed gave extensive evidence as to the allocation of costs shown on page 52 of his report. Mr. Speed's breakdown of costs includes one item (number 25) "Excess Cost of Foundations" which is not included in Mr. Comeau's allocation of costs shown on page 20-A of his report, a copy of which follows:

NATIONAL SEA PRODUCTS LIMITED

LOCKEPORT PLANT

COMPONENTS	COST	NON ASSESSABLE	M & P Equip.	WHARVES	BUILDINGS	SITE IMPROVEMEN
1. Wharves & Foundations	1,611,925	65,000		1,250,000	284,425	12,500
2. Foundations, sewer & water	443,037				443,037	
3. Structural Steel Bldgs A-B	480,514				480,514	
4. Refrigeration Alteration	38,937	20,000	18,937			
5. Struct Steel Bldgs C-D-E-F	294,654				294,654	
6. Roofs	252,419				252,419	
7. Cladding-Ceilings (Salt Fish Area)	459,841				459,841	
8. Architectural-Contract	1,293,961		25,000		1,268,961	
9. Mechanical	1,070,534				1,070,534	
10. Elevator	90,030				90,030	
11. Sprinklers	171,411				171,411	
12. Electrical	715,893				715,893	
13. Refrigeration	804,922		83,422		721,500	
14. Production Equip. N/C	961,741		961,741			
15. Production Equip. Con.	530,603		530,603			
16. Meal Plant - Ren.	137,668		137,668			
17. Site Work	63,477					63,477
18. Demolition-Old Meal Plant	121,293	27,086	94,207			
19. Forklift, Boxes, Etc.	345,729	75,718	270,310			
20. Move Propane	1,830	1,830				
21. General Expense	110,532	110,532				
22. Eng. Design-Supervision	698,514			48,896	614,692	34,326
23. Paving of Parking Lot	109,249					109,249
24. Dredging	22,599			22,599		
25. Interest	589,342	56,667	106,101	63,299	353,871	9,404
TOTAL	11,420,654	356,833	2,227,689	1,384,794	7,221,782	229,556

(02) Bldgs, Site & Wharf =$8,836,132 X 1.98 ÷ 2.47 = $7,083,215 X Dep. .98% = $6,941,551 X Econ. Obs.
.80% = $5,553,241 + Frame Bldgs $7,000 + Land $7,000 = $5,667,241.
(42) Processing Equipment = $2,227,689 X Dep. 75% = $1,670,767.
Sub Total --- $7,338,008
(41) Business Occupancy 50% (Excluding Wharves) $5,667,241
($1,384,794 X 1.98 ÷ 2.47 = $1,110,078 X .98% = $1,087,876 X .80% = $870,201.-$ 870,201
$4,796,940 X 50%
= $2,398,470
Total --- $9,736,478

ROUNDED TO $9,736,300.

(02) - Commercial Real $ 5,667,241.
(41) - Business Occupancy $ 2,398,470.
(42) - Manufacturing & Processing Equipment $ 1,670,767.

Mr. Speed and Mr. Comeau are in agreement with respect to cost item No. 1, Wharves & Foundations in the sum of $1,611,925. This cost was broken down into non-assessable costs of $65,000, wharves $1,250,000, buildings $284,425 and site improvements of $12,500.

They were in disagreement on cost item No. 2 "Foundations, sewer & Water" of $443,037. Mr. Comeau allocated this entire cost to "buildings" whereas Mr. Speed, allocated $50,000 to non-assessable costs, $383,804 to buildings and $9,233 to site improvements.

Mr. Speed and Mr. Comeau were in agreement respecting the allocation of the costs shown in items 3 - 8 inclusive.

On item No. 9 "Mechanical" they were in sharp disagreement, Mr. Comeau allocating the entire cost of $1,070,534 to "buildings" whereas Mr. Speed allocated $435,000 of this item to "manufacturing and Processing Equipment" with the balance of $635,534 to "buildings".

With respect to items 10 and 11 they were in agreement.

Item No. 12 "Electrical" in the amount of $715,893 was allocated 100% to "buildings" by Mr. Comeau and Mr. Speed allocated $472,000 to "Manufacturing and Processing Equipment" and the balance of $243,893 to "buildings" because he considered that this cost related to wiring which functionally serviced the building rather than the manufacturing process.

Item No. 13 "Refrigeration" in the amount of $804,922 was allocated by Mr. Speed mostly to "Manufacturing & Processing Equipment" in the amount of $764,676 with only $40,246 to "buildings". Mr. Comeau on the other hand, allocated most of this item to "buildings" $721,500 with the balance of $83,422 to Manufacturing and Process Equipment.

Items No. 14, 15 and 16, Production Equipment, Non-contract, Production Equipment - Contract and Meal Plant Renovation and Equipment in the respective amounts of $961,741, $530,603 and $137,668 were allocated 100% to "Manufacturing & Processing Equipment" by both Mr. Speed and Mr. Comeau.

Item No. 17 "Site Work" in the amount of $63,477 was allocated 100% to "site improvements" by Mr. Comeau whereas Mr. Speed allocated the sum of $45,920 respecting the cost of storm drainage to "non-assessable" and the balance of $17,557 respecting fencing to "Site Improvements".

Both Mr. Comeau and Mr. Speed allocated the cost of item No. 18 "Demolition - Old Meal Plant" in the amount of $121,293 to M & P Equipment $94,207 and $27,086 to "non-assessable".

Mr. Comeau and Mr. Speed were in disagreement as to their allocations of the costs ($345,728) of item No. 19, Office Furnishings, vehicles, fish pans, shelving, fish boxes, etc. Mr. Speed allocated $174,515 of this item to "non-assessable" and $171,213 to "Manufacturing & Processing Equipment". Mr. Comeau allocated $75,718 to "non-assessable" and $270,010 to Manufacturing & Processing Equipment".

They were in agreement as to the allocation of the costs of items No. 10 and 11 "Move Propane" and "General Expense". These items were allocated 100% to non-assessable in the respective amounts of $1,830 and $110,532.

They were in disagreement as to the allocation of the costs of item 22 "Engineering Design Supervision" in the amount of $698,514. Mr. Speed allocated $412,781 to "buildings", $146,030 to "wharves", $34,926 to Manufacturing & Process Equipment, $69,851 to non assessable. Mr. Comeau, on the other hand, allocated $614,692 of these costs to "buildings", $34,926 to site improvements and $48,896 to "wharves".

Item No. 23 "Paving of Parking Lot" in the amount of $109,249 was allocated 100% to "Site Improvements" by both Mr. Comeau and Mr. Speed.

The cost of "Dredging" item No. 24 in the amount of $22,599 was allocated 100% to "wharves" by Mr. Comeau whereas Mr. Speed allocated this cost to "non-assessable".

Mr. Speed on his table of cost allocations shown on page 52 of his report lists item No. 25 "Excess Cost of Foundations, Construction Costs Before interest Charges", in the amount of $635,237. This item does not appear on Mr. Comeau's equivalent table shown on page 20-A of his report. Mr. Speed allocates this amount to the non-assessable category and also deducts this amount from the cost allocations for "buildings".

The final item shown on page 52 of Mr. Speed's report is "Interest During Construction" in the amount of $589,342. Mr. Speed allocated this cost in the following manner: $66,521 to non-assessable, $198,381 to M & P Equipment, $75,959 to wharves, $238,498 to buildings and $9,983 to Site Improvements. Mr. Comeau's allocations of this cost is as follows: $56,667 to non-assessable, $106,101 to M & P Equipment, $63,299 to wharves, $353,871 to buildings and $9,404 to Site Improvements.

As may be seen from page 61 of Mr. Speed's report which is reproduced as page 28 of this decision, Mr. Speed arrived at the following depreciated values:

Buildings	$1,925,739
Wharves	613,329
Site Improvements	128,965
	$2,668,033

Adding his land value of $88,060 he arrived at a total value for the real estate of $2,756,093. He then applied what he describes on page 28 as "1983 levels of assessment" of 80.16% and the result is $2,209,284 which is his determination of the "1983 assessment of Land, Site Improvements and buildings (excluding machinery and equipment, business occupancy, and cold storage building).

In his letter of transmittal found at the beginning of his report (Exhibit N-2) Mr. Speed explains how he arrived at the 80.16% figure as follows:

> "We are advised by the Department of Municipal Affairs Assessment Division that the base date for the 1983 assessment year is January, 1980, and we are in agreement that the factors reflecting the cost differential between these two dates are $\frac{1.97}{2.47}$, which equals 80.16%. Accordingly, this general level of assessment has been applied to our market value estimate to arrive at the 1983 Value for assessment purposes."

Benjamin Smith the Vice-President, Engineering of National Sea Products Ltd. was called by Counsel for the Appellant.

He is in charge of the Company's engineering group located at Lunenburg. He obtained a degree in Mechanical Engineering from TUNS in 1959. He joined National Sea in 1964. He sits on the Management Committee of the Company. He has had experience in the design and construction of fish plants.

He stated that a new cold storage plant was built by the Appellant at Lockeport in 1973. This plant was not destroyed in the 1980 fire which destroyed the old fish plant at Lockeport. It was used during the construction period of the new plant completed in 1982.

Mr. Smith explained some of the problems encountered in designing the new plant. Raw materials (fish) came to Lockeport by trawlers, some from long liners, some by small fishing boats, some by truck from Jordan Bay and some by truck from other fish processors. The wharf extends a distance into the harbour and the cold storage plant is 11 feet higher than the wharf.

He indicated that the Appellant's policy was to look ahead and allow for extra space and oversize the plant.

Mr. Smith testified that part of the new plant was built on the old foundation areas of the old plant. This construction was done on a cost plus basis. Ideally, he would have preferred one large plant building rather than the three buildings shown on parcels D, E and F on the site plan. Buildings built on parcels B and C are both built on wharves.

Mr. Smith stated that the offal from the Lockeport plant is now trucked to Lunenburg for processing as the Lockeport fish meal plant is not operative. He says it is cheaper to truck the offal to another site.

Mr. Smith stated that $50,000 was expended on re-routing the fresh and salt water lines and extending the sewer line down Water Street. These lines pass under the Appellant's buildings through an easement given to the N.S. Department of Environment.

Mr. Smith stated that all the piping in the plant passes through openings in the walls and could be removed without injury to the walls. Also he said that the electrical wiring passes through conduits and this wiring could be removed by pulling it out from the conduits without injury to the buildings. All wiring is colour coded. Mr. Smith allocated part of the cost of the piping in the plant to manufacturing and processing equipment.

Earle P. Kaiser, was called by the Appellant. He was employed by H.B. Nickerson Ltd. from 1969 - 1981. He was the company's plant manager in P.E.I. for two years. He had been responsible for the renovation and installation of fish processing equipment at Mulgrave and had been General Manager of the Canso Sea Foods plant at Canso. He had been responsible for production with H.B. Nickerson Ltd. in all Nova Scotia plants except Riverport. He formed his own company, Kaiser Consulting Limited, in 1982, which is engaged in consulting work relating to fish processing, including cost estimations. He is the President of Kaiser Consulting Ltd. This company buys and sells used fish plant equipment.

Mr. Kaiser said that most of his time is spent in consulting work but he does advertise that he has fish processing equipment for sale. He has premises in P.E.I., N.B. and N.S. He has no formal training as an appraiser either of real estate or of equipment.

Mr. Kaiser prepared a report filed with the Board as Exhibit N-3. He stated that he visited the Lockeport plant on two occasions. On the first occasion (October 29, 1984), he was accompanied by Mr. Speed and Mr. Peterson the plant manager. He referred to the plant as a mammoth one. On November 7, 1984, he visited the plant for the second time to refresh his memory and to prepare his report. He had a copy of the plant drawings showing the plant lay-out. He also had a copy of Mr. Speed's report of January, 1984. He got his measurements from Mr. Speed's report. He did not actually measure the rooms in the plant but he did pace off the rooms and he counted ceiling tiles. He said he inspected nearly every piece of equipment from the wharf and the plant. He checked the [illegible] plant. He said he has a good knowledge of the plant equipment and the plant capacity.

Mr. Kaiser's report states that the 105,000 sq. ft. of floor space "is sufficient to house equipment and machinery to process over 60 million pounds per year of groundfish and to provide all facilities for the resultant plant personnel". Mr. Kaiser's report indicates that the "fish process facility is in fact 140% larger than it should be."

Mr. Kaiser testified that in his opinion the value of the Appellant's processing machinery and equipment is $2,237,185. This figure includes the cost of office furniture and equipment broken out by Mr. Speed in the amount of $75,718 from the amount of $174,515 of non-assessable costs as shown on page 58 of the Speed report. Mr. Kaiser estimated the "in place" value of the office furniture is 50% of $75,718 or $37,859. By adopting Mr. Kaiser's total value of the processing machinery and equipment of $2,237,185 and deducting the value of the office furniture and equipment one arrives at a figure of $2,199,326 as the value of the processing machinery and equipment. The Board accepts the evidence of Mr. Kaiser as to the value of the processing machinery and equipment over the value suggested by Mr. Comeau on the basis of Mr. Kaiser's superior knowledge of the market for used fish processing equipment. Mr. Comeau in arriving at his valuation simply took what he believed to be the cost ($2,227,689) of the manufacturing and processing equipment including interest and applied a depreciation factor of 25% arrived at a valuation of $1,670,767 which he considered was the value as of January 1, 1983.

The following is the position of the Appellant and of the Director with respect to the 1983 assessments as shown in their post hearing submissions:

	Appellant		Director
Real Estate	$2,209,284		$5,667,241
M & P Equipment	1,762,980	(80,16% of $2,199,326)	1,670,767
Business Occupancy	1,104,642		2,398,470
	$5,076,906		$9,736,478

The Town of Lockeport did not in its post hearing submission indicate precise figures for assessment. The Town submits that the replacement cost less depreciation is the proper method to use in determining value for assessment purposes in this instance. The Town disagrees with both the Appellant and the Director in their submissions regarding economic obsolescence. The Town takes the position that there is no evidence of economic obsolescence. The Town also disputes the allocation of the Appellant concerning "excess costs". The Town argues that the costs to be excess "must be shown to be abnormal for a comparable site and a comparable plant building".

It is noteworthy that the decision of the Regional Assessment Appeal Court did not precisely determine the assessment values of the Appellant's property for 1983. The decision makes a number of findings and concludes by stating that "In all other respects, I confirm the assessment presented by the assessor". It would appear from page 1 of the Appellant's pre-hearing memorandum that Mr. Speed interpreted the Regional Court decision to indicate a total assessment of $8,935,472 while Mr. Comeau interpreted the decision to result in a $9,334,079 total assessment.

The cost allocations in dispute at the hearing before the Board relate to the following items:

No. 2 - Foundations, sewer and water
No. 9 - Mechanical
No. 12 - Electrical
No. 13 - Refrigeration

No. 17 - Site Work
No. 22 - Eng. Design-Supervision
No. 24 - Dredging
No. 25 - Excess Costs of Foundations
No. 26 - Interest During Construction

In the post hearing brief filed on behalf of the Director it is stated at page 35 that "The Director's main concern is with respect to the categorization of pipes and wires which are necessary for the property to operate as a fish processing plant, and which are an integrated and permanent part of the building in that they begin at a main power or water source and then are split off to various needs and locations throughout the plant, at times passing through walls, ceilings or floors and going from one building to another. They are not mobile and observable damage would result from their removal. ...The Director is of the opinion that these pipes and wires are part of the building and that such pipes and wires should not be 'traced' back to their source because they are necessary to enable a particular operation to be carried out in a special purpose plant."

Mr. Comeau in his evidence appeared to apply the test of "integration" in allocating costs between buildings and machinery and equipment used in processing. If the machinery and equipment was in any way fixed to the realty he considered it as part of the building and assessed it as such. In classifying the piping shown in the bottom picture of page 39 of his report as part of the building, Mr. Comeau when asked on cross-examination whether the "function" of the pipes influenced his decision stated "no". He was asked about the compressor shown in the bottom picture on page 40 of his report and he stated it was used in processing but he classified it as part of the building.

On direct examination, Mr. Comeau when asked how he decides in classifying items between buildings and equipment responded that he is not governed by the degree of annexation but does consider the size and weight of the item and its integration into the building and its degree of mobility.

As has already been mentioned Mr. Speed allocated $635,237 to non-assessable as representing the amount estimated by Mr. Speed as the amount spent by the Appellant over what would have been normally required to lay the foundations because of the site difficulties. Mr. Comeau inadvertently did not delete this amount from his building costs although he stated at the hearing that this cost is not assessable. The Board agrees with the Appellant that this excess cost is non-assessable and accepts the evidence of Mr. Speed and Mr. Smith as to the dollar value of the excess cost.

Mr. Comeau allocated the entire cost of $1,070,534 under item 9 (mechanical) to buildings on the basis that the pipes and duct work making up this item were integrated into the building and were not mobile. Mr. Speed on the other hand broke out this cost and allocated $435,000 to M & P Equipment and $635,534 to buildings based on the function served. In the Board's opinion Mr. Speed's method was correct.

Undoubtedly, the determination of a proper assessment for the subject plant and equipment in conformity with the provisions of Section 38 of the Assessment Act is not an easy task for either the assessor or for the appraiser. This is partially due to the fact that there have not been any recent sales of truly comparable fish plants in Nova Scotia. Both Mr. Speed and Mr. Comeau acknowledged this fact although Mr. Speed did analyse some fish plant sales which he agreed were not truly comparable for purposes of establishing a market value of the subject property by means of the market data approach. Nevertheless he used these sales as a means of checking the valuation he determined by the cost approach. Mr. Speed also found these sales useful in determining depreciation and obsolescence relating to the known sales which gave him a range of percentages for depreciation and obsolescence which indicated to him that the rates of depreciation and obsolescence determined by him for the subject property were in line. Mr. Comeau chose not to rely on these fish plant sales for any purpose because they were either non arms-length sales, i.e. were receivership sales or related to fish plants Mr. Comeau did not believe were comparable. The Board is of the opinion that Mr. Speed properly considered for a limited purpose only the results of the fish plant sales shown in the table on pages 28 and 29 of his report and also properly considered his obsolescence and depreciation analysis shown in the table on page 49 of his report.

Both Mr. Speed and Mr. Comeau rejected the use of the income approach and the market data approach for the determination of values in this instance. The Regional Court Judge found that these methods "are not appropriate methods of determining the market value of an operating plant". The Board is of the opinion that in this particular case these methods are inappropriate but that either one or both might be appropriate in a different fact situation.

It follows that assessment values of necessity in this instance must be determined by the cost approach.

Since the Appellant's plant at Lockeport is undoubtedly one of a kind it is understandable that opinions as to its value and how that value is determined will differ especially with regard to the selection of proper and reasonable rates of depreciation and obsolescence. This selection process is a matter of subjectivity and the Board can appreciate the views of the assessor and the appraiser in expressing quite different views.

In this case the Board is of the opinion that where the evidence of Mr. Comeau is in conflict with that of Mr. Speed the Board should rely on the evidence of Mr. Speed because of his greater experience and expertise in the appraisal of real estate and also because of his methodology in applying a function or purpose test in allocating the known costs of the plant and equipment among the three categories of buildings processing and manufacturing equipment, and non-assessable items.

The Board was faced with a difference of opinion between the assessor and the appraiser as to methodology in the case of the appeal by the Director of Assessment respecting the assessment of the Moir's Chocolate factory. The Board's decision in that case is dated September 20th, 1985, and the Board, following the decision of Hart J.A. in the Riverport Seafoods Ltd. case reported in (1981), 44 N.S.R. (2d.) 281 accepted the evidence of the appraiser who employed the function or purpose test in his allocation of costs between buildings and machinery and equipment. The Board's application of the function or purpose test was given approval by Matthews J.A. in his decision dated February 19, 1986 (S.C.A. No. 01511) given on behalf of the Appeal Division of the Supreme Court of Nova Scotia in the case of the appeal by The Director of Assessment from the Board's decision in the Moir's Chocolate factory case.

Matthews J.A. in his decision of February 19, 1986, after quoting from Hart J.A. at page 287 of the Riverport case states:

> "The old law respecting fixtures is no longer applicable.
>
> In applying the Act and the law as enunciated in Riverport, five categories must be considered in determining the assessable property under review here::
>
> 1. "land and land covered by water" (s. 1(a)(i)).
>
> 2. "buildings and structures erected or placed upon, in, over, under or affixed to land; (s.1(a)(v)).
>
> 3. "machinery, equipment, appliances, storage and working tanks, and other things,..." which are "...incorporated in the buildings and should be considered a part thereof,..." as expressed by Mr. Justice Hart at p. 287 of Riverport or, as expressed by the Board, "...which are so attached integrated or annexed to the building that they are part of the building..." These items are assessed under s. 1(a)(v).

> 4. "machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing..." which are mobile. These items are assessed under s. 1(a)(vi).
>
> 5. "machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing...", regardless whether it is, or they are, affixed to the land or buildings. These items are assessed under s. 1(a)(vi).
>
> The Board properly applied that which may be called a purpose or functional test in determining the items in category number 5. It is noted that the items set out in s. 1(a)(vi) or the Act are not mutually exclusive for the listing includes "and other things"."

The Board finds that Mr. Speed properly carried out his appraisal in accord with Section 38 of the Assessment Act and in allocating assessable property between Sections 1(a)(v) and 1(a)(vi) of the Assessment Act as those Sections have been interpreted by the Appeal Division of the Supreme Court of Nova Scotia in the Riverport and Moir's (Nabisco) cases.

Mr. Speed although he did not personally carry out an appraisal or valuation of the manufacturing and processing equipment relied on values for these items determined by Mr. Kaiser. He also relied on information from Mr. Smith as to the amount of excess costs of foundations (item No. 25) on his table shown on page 52 of his report.

A great deal of evidence by the Director and by the Town stressed the fact that the subject plant is a modern, state of the art efficient fish plant. Considering the restraints of the site and the fact that the plant was built to accommodate the existing cold storage plant which was not destroyed in the 1980 fire the plant undoubtedly has some considerable excess capacity which could be employed by the Appellant if sufficient quantities of fish were available for processing and market conditions warranted increased production. However, to accommodate greatly increased production, assuming the availability of fish for processing, the Appellant would have to add another processing line in the plant or increase the number of shifts at the plant or both. From the evidence neither of these options would appear to have been economically feasible at the relevant time (December, 1982) when the assessment is effective.

The Board accepts Mr. Speed's evidence that there is a considerable degree of functional obsolescence in the plant and while his figure of 37.5% is relatively high for a new plant it nevertheless seems reasonable in relation to the observations of Mr. Speed of other fish plants and from Mr. Speed's observation of excess space in terms of a normal plant of the same capacity.

Undoubtedly there is a considerable amount of economic obsolescence as Mr. Comeau estimated it at 20% and Mr. Speed at 33 1/3%. Mr. Speed's analysis of fish plant sales which admittedly included some receivership sales indicated a range of overall depreciation between 48% and 99%. The Board accepts Mr. Speed's statement on page 8 of his Supplementary Report (Exhibit N-9) where he states that. .."we are of the opinion that a realistic estimate of economic obsolescence due to external factors is in the order of 33.3% of the depreciated value after subtracting the estimate of functional obsolescence".

The Board accepts and approves Mr. Speed's calculation of a level of assessment of 80.16% to be applied to his market value estimate for the commercial real estate in order to reflect the cost differential between the 1983 assessment year and the base date of January, 1980. The appraiser Mr. Comeau employed the same percentage in adjusting the value of buildings, site and wharves to January 1, 1980 as may be seen from his calculations shown on page 20-A of his report.

Mr. Comeau although he used the 80.16% to adjust his estimates of value for buildings, site and wharves to January 1, 1980, did not make the same adjustment for manufacturing and processing equipment. He simply applied an overall depreciation factor of 25% to the cost of this equipment. In the opinion of the Board he should have made the same adjustment of 80.16% to the manufacturing and processing equipment as he did for the buildings, site and wharves.

The Appellant's position is that the 80.16% adjustment made to the estimate of value for the buildings, site and wharves should be made to the manufacturing and processing equipment. The Board agrees with the Appellant in this regard.

In its decision the Regional Court in paragraph 7(c) ordered by virtue of Section 91(1)(a) of the Assessment Act that the amount of $120,000 representing the value of two freezer units included in the assessment of the subject property be deleted from this assessment and be added to the assessment of the cold storage plant. The Appellant submits that in this regard the Regional Court was in error but if it is wrong in that submission the assessed value to be added to the assessment should be the cost of the freezers "less the depreciation factor applied to the other machinery in the cold storage building less an amount to bring the equipment into uniformity with other industrial equipment assessed in 1980".

The Board agrees with the Regional Court in its decision to add the freezers to the assessment roll relating to the separate assessment for the cold storage plant owned by the Appellant. The assessment of the cold storage plant was not in issue before the Board. The Board, however, respectfully disagrees with the assessed value to be attributed to the freezers. The original cost of the freezers was $120,000. The evidence of Mr. Comeau is that he applied a depreciation factor of 25% to arrive at the assessed value of manufacturing and processing equipment. There was no evidence from the Appellant as to a value to be applied to the freezers for assessment purposes.

The Board is of the opinion that the value of the two freezers for assessment purposes is the original cost of the freezers ($120,000) less the depreciation factor applied to the other machinery and equipment in the cold storage building (25%) and the resulting figure adjusted to January 1, 1980. Therefore the calculation of assessed value is as follows:

Original cost	$120,000
Less 25% depreciation	30,000
	$ 90,000 x 80.16% = $72,144

In summary the Board determines the assessment of the Appellant's property for the assessment year 1983 as follows:

Commercial - Real	$2,209,284
Processing Machinery and equipment	1,762,980
Business Occupancy Assessment (50% of $2,209,284)	1,104,642
	$ 5,076,906

The Board allows costs to be taxed by Arthur Hare, Q.C., of Halifax, on the County Court scale on a party and party basis against the Director and the Town of Lockeport.

An order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of March, A.D., 1986.

RH Blois

R.H. BLOIS, Chairman

EA Salton

ELIZABETH A. SALTON,
Vice-Chairman

DARRYL W. WILSON, Member

Nowlan v. Director of Assessment

ASSESSMENT--RESIDENTIAL--COST APPROACH--ONUS ON APPELLANT--MARKET DATA USEFUL FOR GENERAL CONFIRMATION

This is an appeal from a decison of the Kings Regional Assessment Appeal Court which confirmed the Appellant's 1984 residential assessment at $67,500.00. The Appellant's position was that the assessment was too high given the state of disrepair or dilapidation of the house.

HELD: The appeal is dismissed without costs.

The Appellants have not discharged the onus on them to substantiate that the subject property was over-valued by the assessor. The Board accepts the methods employed by the assessor. The cost approach was proper here. Market data was useful to give a general confirmation of the assessed value.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by Minnie F. Nowlan et al from the decision of the Regional Assessment Appeal Court, Kings Assessment Region, dated June 7, 1985, which confirmed the assessment of a property at 387 West Main Street, Wolfville.

BEFORE: ELIZABETH SALTON, Vice-Chairman
(formerly Elizabeth Lawrence)

COUNSEL: MINNIE F. NOWLAN, on behalf of herself and two other assessed owners of the subject property

RANDALL DUPLAK, LL.B., for the Director of Assessment

DECISION

A hearing was held on October 29, 1985, in the Council Chambers of the Civic Building in Wolfville on an appeal by Minnie F. Nowlan, Paul A.G. Nowlan and Joyce E. Nowlan from the decision of the Regional Assessment Appeal Court, Kings Assessment Region, dated June 7, 1985, which confirmed the 1984 assessment of their residential property at 387 West Main Street in Wolfville in the amount of $67,500.00. The Notice of Appeal (Exhibit N-1) dated July 8, 1985, and signed by the three joint owners was received by the Board July 11, 1985. In essence, the grounds for appeal were that the assessment was too high, given the condition of the property.

There being no objections to the Board's jurisdiction to hear this appeal, the Board assumed jurisdiction and heard the appeal on its merits.

Mrs. Minnie Nowlan and her son Paul gave evidence for the Appellants. Mr. Gregory Bishop, the assessor, was the only witness for the Director.

The subject property is a large two-storey clapboard house built in 1903, located on a level lot 160 feet deep with 150 feet of frontage on Main Street, to the west of the main business section of the town but within walking distance of it. The property has town water and sewer service. The house has open verandahs, a full basement, hot water heating and two fireplaces. The lower floor of the house contains a double living room, dining room, kitchen, pantry and den; the upper floor contains 5 bedrooms, a linen room and a bathroom.

Mrs. Minnie Nowlan who has lived in the subject property for 59 years gave an extensive history of its acquisition, the subdivision and sale of various lots taken from the original large parcel of land and its assessment history in recent years. In 1980 the subject property was assessed at $36,000.00. In 1983 the assessment increased to $58,000.00, and in 1984 it increased again to the current assessed value of $67,500.00. In Mrs. Nowlan's opinion the assessment of the property should be dropped to the 1980 level of $36,000.00 because of the state of "disrepair or dilapidation of the house". She pointed out that her late husband had wanted to appeal the 1983 assessment but was unable to do so because of his terminal illness.

Mrs. Nowlan filed 14 Poloroid colour photographs taken by her son and son-in-law four days previously showing interior and exterior portions of the house to illustrate areas where repairs are needed because of rotten wood, loose and cracked plaster, peeling paint, dry rot, deteriorating cement, etc. She said that the house needs to be rewired. In spite of repairs which had been done to the house, she felt that it was still in a state of disrepair.

Mrs. Nowlan pointed out that the R-2 zoning in the neighbourhood which permits single family, semi-detached and duplex residential development may create a misleading impression that the neighbourhood is primarily low-density residential in character. She enumerated several land uses in the area of the subject property which did not conform to the R-2 zoning, including a vinegar plant, the canteen owned by the Appellants located on an adjacent lot, a group home for mentally retarded adults, a plumbing business, a rooming house and an apartment building.

In cross-examination Mrs. Nowlan estimated that the necessary repairs to the subject property would cost approximately $30,000.00, of which amount only the electrical and painting work had been professionally estimated. Mrs. Nowlan said that her son, one of the Appellants, runs the canteen and was unable to do any of the repairs which are needed.

Gregory Bishop, an assessor in the Kings Assessment Region with 14 years' experience in the assessment field, who had assessed the subject property, gave evidence on his method of estimating market value and his opinion of value for assessment purposes of the Nowlan property.

Mr. Bishop considered the three methods of estimating market value (market data approach, income approach and cost approach) and concluded that neither the market data nor the income approach were appropriate for the subject property. Mr. Bishop eliminated the market data approach because he found only two sales of comparable large older residential properties. He believed that there was a large difference in size and condition between the subject property and the two comparables and that there was not enough market information upon which to base adjustments to those comparables. The income approach was not appropriate in his opinion because the subject property was a single family residence rather than a revenue producing property.

The assessor used the cost approach to determine the market value of the subject property. He estimated the land value by analyzing comparable land sales adjusted for time and lot size, if different from the standard town lot depth. Using 3 recent property sales and deducting the value of the building (depreciated) and improvements, Mr. Bishop arrived at an adjusted price per front foot ranging from $126.43 to $152.99. He chose to use a foot frontage price of $125.00 per front foot because that was an average land price in 1983 in the area of town where the subject property is located and because in his experience, smaller lots sold for a lower price than larger properties such as the subject property. The subject lot has 150 feet frontage on Main Street and is 160 feet deep. The standard lot depth in Wolfville is 125 feet.

150 front foot x $125.00 = $18,750.00

Depth factor 1.11 x $18,750 = $20,812.00

Total estimate of subject lot value is
$20,812.00, rounded to $20,800.00.

In estimating the replacement cost of the dwelling on the subject property, Mr. Bishop used the tables in the Nova Scotia Assessment Manual (Residential) as modified by the Boeckh costing index for local construction cost increases. He calculated the replacement cost of the subject property according to the Manual to be $60,866.00. To this amount he added $4,257.00 for an open verandah and an additional $1,899.00 for a 2-storey open verandah which resulted in a total value of $67,022.00. From this total he deducted $1,256.00 for a wet basement and added $2,755.00 for two fireplaces and $259.00 for an additional sink, giving a total value of $68,800.00. Using the Boeckh's local index to bring the costs to a January 1983 value, he multiplied the last amount by 1.70 which resulted in a total replacement value of $116,960.00.

From the 1983 replacement value, Mr. Bishop deducted 20% for obsolescence (5% for the mixed residential-commercial area and 15% for obsolete features such as the size of the house, high ceilings, older plumbing, 110 wiring, small cut-up rooms, and the high heating costs).

He deducted a further 50% for depreciation because of the age of the house. Mr. Bishop said that the general rule for depreciation in the manual was a loss of 1% in value for each year of age. In this case, application of the rule would lead to 100% depreciation, but Mr. Bishop felt that the house was "fairly well maintained" and so he chose to use a depreciation rate of 50%.

After reducing the $116,960.00 replacement cost of the house by $23,392.00 for locational and functional obsolescence and by $46,784.00 for depreciation, Mr. Bishop arrived at a value for the house of $46,784.00. Adding the value of the lot($20,800.00) resulted in a total estimate of value for the subject property of $67,584.00 rounded to $67,500.00 as of January 1, 1983.

In cross-examination, Mr. Bishop said that the real estate market in Wolfville was strong, that the ratio of old to new houses in the town was approximately 50-50, and that the effect of increased oil prices which had depressed the prices of large older houses appeared to have lessened.

Having considered the evidence and argument in this appeal, the Board concludes that the Appellants have not discharged the onus on them to substantiate that the subject property was over-valued by the assessor. While the assessor chose to use the cost method to estimate the value for assessment purposes of the subject property, he did give market data evidence on two 1983 residential sales of properties with large older residences in Wolfville. Both were assessed at a higher amount than the subject and sold for an amount $2,500.00 to $5,000.00 higher than the assessed value. Although the Assessor did not carry out a detailed analysis of these comparables because he believed that there was too great a difference in size and condition between the subject and the two comparables (the subject is larger than both), and that there was not enough market information on properties of this type on which to base adjustments to the comparables, nevertheless the Board believes this market data gives a general confirmation of the assessed value of the subject property.

The Board accepts the methods employed by the assessor and the assessed value of the subject property as calculated by him. The appeal is dismissed without costs and the 1984 assessment of the property of Minnie F. Nowlan, Paul A.G. Nowlan and Joyce E. Nowlan at 287 West Main Street, Wolfville, is confirmed at $67,500.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 16th day of April, A.D., 1986.

E.A. Salton

ELIZABETH SALTON
Vice-Chairman

Trizec Equities Limited v. Director of Assessment

ASSESSMENT--COMMERCIAL--ASSESSABLE PROPERTY--ADDITIONAL SEVEN STOREYS UNDER CONSTRUCTION--WHETHER FACT ADDITION IS INCOMPLETE AND NOT READY FOR OCCUPATION AFFECTS ASSESSABILITY--ASSESSMENT ACT, SS. 1(a)(v), 64(1A)--INTERPRETATION ACT, S. 24(2)

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court which confirmed the 1983 commercial assessment of the Maritime Centre in the amount of $22,424,000.00 and reduced the 1984 assessment by $640,900.00 from $41,338,000.00 to $40,697,100.00. In Sept. 1982 construction began of seven additional floors of office space and a penthouse above the existing twelve stories of the Centre. The assessments in 1983 and 1984 had been determined by taking the income approach to the existing Centre and adding the actual costs of construction to Oct. 31st of each assessment year. The present portion of the appeal concerned only the question of whether the additional seven floors while under construction are assessable property under s. 1(a)(v) of the Assessment Act.

HELD: The seven floor under construction are assessable property. The Board will reconvene to hear evidence on the proper amount of the Appellant's assessment.

Section 1(a)(v) of the Assessment Act in force in 1983 and 1984 states that "assessable property means: buildings and structures erected or placed upon, in, over, under or affixed to land." This section was subsequently amended by adding to the above definition the following words: "including buildings and structures under construction or partially constructed." On Dec.1, 1982 and Dec. 1, 1983 there was in place on the subject land a completed and fully occupied twelve storey building consisting of office space, a shopping mall and underground parking. On those dates none of the additional storeys was in a state of completion which would permit occupation by tenants. It is the opinion of the Board that the additional storeys actually constructed although not suitable for tenant occupation, nevertheless form part of an existing building and the building is assessable property as a building erected or placed upon the subject land. The fact that some portion of the building is incomplete and not ready for occupation does not have any material effect on the fundamental fact that there is an existing building erected or placed upon land. Even if the additional construction does not form part of an existing building it could nevertheless be said to be a "structure" erected or placed upon, in, over or affixed to land under s. 1(a)(v) of the Assessment Act. That section is clear in meaning: if there is a building or structure which has been either erected or placed in, on, over, under or affixed to land, then that building or structure is assessable. The section does not require that buildings and structures "form an integral part of an operational unit" as is the use for machinery and equipment under the Assessment Act. The subsequent amendment of s. 1(a)(v) has no bearing on what the proper interpretation is of the section prior to the amendment. In summary, the unfinished portion of the subject building is in fact a portion of the erected building and is part of the property which is assessable under s. 1(a)(v).

Note

Leave to appeal the Board's decision was granted to Trizec and a hearing was held. The Appeal Division of the Supreme Court dismissed the appeal by Trizec. (See 1986 S.C.A. No. 01672).

NSMB-121-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **TRIZEC EQUITIES LIMITED** from the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region, made August 27, 1985, respecting property bearing Civic Nos. 1503-7-9-19 Barrington Street, in the City of Halifax.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH SALTON, Vice-Chairman
RICHARD L. WELDON, Member.

COUNSEL: RICHARD N. POOLE, LL.B., and MICHAEL T. PUGSLEY, LL.B., for the Appellant;

MARY ELLEN DONOVAN, LL.B., for the City of Halifax;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

By Notice of Appeal dated October 3, 1985, **TRIZEC EQUITIES LIMITED** (hereinafter called the Appellant) appealed the decision of the Regional Assessment Appeal Court, Halifax City Assessment Region made August 27, 1985, which confirmed the 1983 assessment of the Appellant's commercial property known as the Maritime Centre situate at 1503-7-9-19 Barrington Street in the City of Halifax in the amount of $22,424,000.00 and determined the 1984 assessment in the amount of $40,697,100.00.

The Appellant's Notice of Appeal was filed with the

Board on October 4, 1985.

Counsel for the Appellant filed with the Board as Exhibit T-3 an Affidavit of Service sworn to by Michael T. Pugsley on April 1, 1986, indicating service of the Notice of Appeal within the 30-day appeal period on the City Clerk, the Director, the Minister of Municipal Affairs, the Chairman of the Halifax City Assessment Appeal Court and the Recorder. It also indicates that a copy of the Notice of Appeal was filed with the Clerk of the Board. Counsel for the City of Halifax and for the Director agreed that the Appeal was properly before the Board. The Board being satisfied that all the requirements of the Assessment Act, R.S.N.S. 1967, c. 14 and the Municipal Board Act, S.N.S. 1981, c. 9 had been carried out, assumed jurisdiction to hear the appeal.

An agreed Statement of Facts signed by Counsel for the Appellant, the City of Halifax and the Director was filed with the Board on March 26, 1986 and given Exhibit No. T-2 at the time of the hearing of the Appeal held on April 1, 1986. Pre-hearing memoranda were filed with the Board by Counsel for the Appellant, the City of Halifax and the Director.

FACTS

The subject property located on the east side of Barrington Street immediately south of Salter Street at the southern end of the City's Central Business District on land zoned C-2, consists of a shopping mall and office tower complex known as the "Maritime Centre". The building in question was constructed in two phases pursuant to a building permit issued by the City on April 1, 1975 to "construct office tower, retail and parking complex Maritime Centre Phases 1 and 2 subject to City of Halifax letter dated April 2, 1975." Phase 1 included indoor parking facilities, retail and office space up to and including the 12th floor. The City issued the Appellant an occupancy permit for phase 1 on September 13, 1977.

On March 31, 1982 the Appellant applied to the City for a building permit to construct 7 additional floors of office space and a penthouse comprising Phase 2 of the complex. Construction of Phase 2 began on September 15, 1982.

The commercial assessment of the subject property for the assessment year 1983 was $22,424,000.00 and the original assessment for 1984 was $41,338,000.00. The Regional Assessment Appeal Court confirmed the 1983 assessment and reduced the 1984 assessment by $640,900.00 to $40,697,100.00.

In determining the 1983 and 1984 assessments the assessor employed the income approach to valuation for that portion of the property which was completed in 1977 to which was added the actual costs of construction of the additional 7 stories to October 31st of each assessment year.

Items 10, 11 and 12 of the Agreed Statement of Facts (Exhibit T-2) read as follows:

> "10. The 'Time Scheduling Activity Check List' prepared by the general contractor for the project, Robert McAlpine Ltd., sets forth each component activity of the construction together with the effective dates for the start and finish of each such component, for the purposes of the contractor only. It indicates, inter alia, the following:
> Commencement of Construction - September 15, 1982
> Completion of Roof - February 28, 1984

Completion of Electrical Work - April 30, 1984
Completion of Elevators - June, 1984
Completion of Heating and Ventilation - April 15, 1984
Completion of Core Area and Plumbing Installation - April 11, 1984
There is no agreement on substantial completion.

11. The timetable of tenant occupancy and construction of tenant improvements indicates the following:

TENANT	AREA SQ. FT.	FLOORS	EFFECTIVE LEASE DATE	MOVE IN DATE	TENANT WORK START	TENANT WORK COMPLETE	RENT COMMENCEMENT
rovince f N.S.	49,141	13th & 14th	April 27/84	April 21/22/84 to May 26/84	April 4/84	April 27/84 to May 27/84	April 27/84 to June 1/84
eed tenhouse	7,347	15th	July 1/84	May 26/27/84	May 11/84	95% by July 1/84	July 1/84
llstate	5,200		Oct. 1/84	Sept. 29/30/84	August 31/84	Sept. 28/84	Oct. 1/84
ublic orks anada	81,661		Dec. 10/84	Dec. 8/9/84 to Jan. 13/85	August 27/84	95% by Dec. 9/84	Dec. 10/84

12. Additional management, cleaning, garbage compacting, security and window washing services necessitated by the use of the additional space were begun only after occupancy by the tenants of the new space and as required."

The Appellant's Notice of Appeal filed as Exhibit T-1 lists the following grounds of appeal, viz:

"1. THAT the amount of the assessment and the Decision of of the Regional Assessment Appeal Court is greater than the actual cash value of the Appellant's lands;

2. THAT in its Decision, the Regional Assessment Appeal Court failed to have proper or any regard to the assessment of all properties in the Municipality as to ensure that taxation should fall in a uniform manner upon all property

in the Municipality;

3. THAT the amount of the assessment is arbitrary and unsupported by the evidence;

4. THAT the Regional Assessment Appeal Court acted on wrong principles of law in setting the assessment;

5. THAT the Regional Assessment Appeal Court erred in overvaluing the lands of the Appellant;

6. THAT the Regional Assessment Appeal Court erred in law in determining that the unfinished property of the Appellant was assessable in law;

7. THAT the Regional Assessment Appeal Court erred in law in construing the Assessment Act to apply to unfinished buildings or structures;

8. THAT the Regional Assessment Appeal Court erred in fact and in law, in having regard to an alleged assessment practice of assessing partially completed buildings or structures;

9. Such other grounds as may appeal."

The main issue in this case is the question of whether or not the additional seven floors of phase 2 are assessable property under the provisions of Section 1(a)(v) of the Assessment Act, R.S.N.S. 1967, c. 14 which was in force for the assessment years 1983 and 1984 and if they are assessable, the determination of the value for assessment purposes of these additional floors. Section 1(a)(v) of the Assessment Act in force for the 1983 and 1984 assessment years states that "assessable property means: buildings and structures erected or placed upon, in, over, under or affixed to land".

Although it is the assessment of the Appellant's property for the assessment years 1983 and 1984 which are in dispute, it was brought to the attention of the Board by Counsel for the Appellant in their pre-hearing brief that Section 1(a)(v) of the Assessment Act was amended by the Statutes of Nova Scotia 1984 c. 15 with the result that Section 1(a)(v) now reads as follows:

> "Assessable property means:
>
> buildings and structures erected or placed upon, in, over, under or affixed to land, including buildings and structures under construction or partially constructed".

This amendment came into effect after the assessments of the Appellant's property for the two years in dispute were determined. The relevance and effect of this amendment with respect to the subject appeal is a matter which will be subsequently addressed in this decision. The result of this amendment removes any possible doubt about the assessability of buildings and structures under construction or partially constructed for the year 1985 and subsequent years.

On April 1, 1986 the Board heard the evidence of Robert McCrindle on behalf of the Appellant and Denvert Levy and Gloria McCluskey on behalf of the Director of Assessment. This hearing on April 1st proceeded on the understanding of Counsel that evidence relating only to the question of the assessability of the Appellant's property would be adduced and should the Board determine that the property is assessable the hearing would be reconvened to hear evidence on the question of valuation.

Counsel were requested by the Board to make opening statements indicating what they considered the issues to be, what they intended to prove and the names of the witnesses they would call.

Mr. Poole on behalf of the Appellant stated that the main issue was the assessability of the seven additional floors of the subject building for the assessment years 1983 and 1984. He stated that the position of the Appellant was that these additional floors which were not completed until late in the year 1984 were not assessable property within the definition of assessable property set out in the Assessment Act. He indicated that the Appellant would argue that a building or structure to be assessable property would have to be erected or been placed upon land in order for it to be assessable within the definition of assessable property set forth in Section 1(a) of the Assessment Act. He further stated that a building or structure must be "completed to the extent at which it is fit for the purposes for which it is being constructed" to be assessable property. He said that the Appellant's position is that the additional floors are not assessable property even though they may add value to the building. He said he would call only one witness, Robert McCrindle with respect to the question of the assessability of the additional seven floors.

Counsel for the Director indicated that essentially the position of the Director of Assessment is that the partially constructed portion of the subject building is assessable property under Section 1(a)(v) of the Assessment Act. She also said the Director would rely on Section 64 of the Assessment Act in support of the Director's position that a partially completed building is assessable. Section 64 provides inter alia that the assessment roll shall be completed by December 31st in each year and "the assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll."

Counsel for the City of Halifax stated that the City's position is that the portions of the construction of the additional floors which had been completed as of December 1, 1982 and December 1, 1983 formed part of the structure which had been previously built and were assessable property for the years 1983 and 1984.

Pre-hearing Memoranda were filed with the Board on behalf of the Appellant, the Director and the City, all of which addressed the legal issue as to whether the partly constructed seven stories of the subject building constituted assessable property as of December 1, 1982 and December 1, 1983 pursuant to Section 1(a)(v) of the Assessment Act for purposes of the 1983 and 1984 assessment years.

Robert McCrindle, the project manager employed by the Appellant during the construction of Phase II of the subject property was called by the Appellant. He has held the position of project manager for the past 12 years. He holds the degree of Bachelor of Commerce from McGill University. He was involved in the construction of Phase II from the beginning and was on site from July, 1982 to January, 1985. Phase II consisted of the construction of seven additional stories on top of the existing 12-storey office and shopping mall complex. Phase I was built in 1975 and 1976. His responsibilities relating to the project were to work with the Appellant's consultants in the design of Phase II and to "contribute to the extension of base building facilities into that Phase II so that it would be created into an office type of construction which subsequently would be rented as office space". Mr. McCrindle stated that construction of Phase II started in September of 1982 and the building was weather tight and enclosed by the end of 1983 "to the point where the elevator and air conditioning and various other services could be installed from an electrical point of view...".

Mr. McCrindle was asked to describe the status of construction in December of 1982. His answer was that "...by then the structural phase of the work had commenced whereby form work for the structural columns for the first additional floors were being installed on the roof; the two construction cranes were to be used to hoist up the concrete to be poured in these forms, they were in place and operational and more specifically we were in the process of forming and starting to pour the first new concrete slab which would be the 14th floor".

Mr. McCrindle was asked to explain the purpose of a document entitled "Time Scheduling Activity Check List" respecting Phase II of the Maritime Centre which was prepared by the general contractor, Robert McAlpine Ltd., a copy of which is attached to the Agreed Statement of Facts filed as Exhibit T-2. Mr. McCrindle explained that document is a construction activity time schedule. From his point of view the value of this report is to see the actual starting date and the completion or finish date for various components connected with the construction. This document is in the form of a computer print-out and is dated December 20, 1983, which indicates a project start date of August 1, 1982 and a project end date of July 10, 1984. Mr. McCrindle stated that this type of computer print-out report was given monthly to him by the contractor and he would verify the information given to him before approving payment of progress claims. Mr. Poole submitted that the information on this list is an accurate statement of the construction schedule.

Mr. McCrindle was asked to give the status of construction as of December 1, 1983. From the testimony of Mr. McCrindle it is clear that the additional 7 stories constituting Phase II of the development in question were far from being completed and ready for tenant occupation as of December 1, 1983. On that date, the glazing was not complete but was in the process of being installed, the roof was not weather tight and the installation of the elevators had commenced but was not completed. The lobbies on the additional floors were not completed until the elevators were put into service early in 1984.

Mr. McCrindle stated that the project architect issued a qualified certificate of substantial completion on January 29, 1985. He stated that the reason for the qualification in the certificate was because of "some unresolved items related to the pre-cast system". He was asked if the general contractor had been paid for his work and he stated that he had not been fully paid. The owner had retained a holdback of a portion of the contract price.

Mr. McCrindle stated that the first tenant to occupy a portion of the 7-storey addition did so at the end of April, 1984. He said that the building was available to tenants to carry out leasehold improvements in January and February of 1984.

On cross-examination Mr. McCrindle agreed that the Appellant had planned to construct a 19-storey building on the subject site in two phases, the first phase to consist of a retail shopping mall and 12-stories of office space and the second phase to consist of 7 additional stories. He also agreed that the initial 12-storey building was constructed in such a manner so as to carry the additional load of 7 stories. He agreed that two of the four high rise elevators were actually installed and operated in the Phase I section of the building "because they have to serve floors 11 and 12".

Mr. McCrindle while under cross-examination was asked if at the present time there was one building or two buildings on the subject land very reluctantly stated there was only one building.

Mr. McCrindle stated that the original design of the subject building was for 20 storeys "so the foundations, footings and the columns were sized to take 20 storeys. He was unable to state how much over capacity was built into the first 12 storeys. It was his understanding that the building was to be built to full height at the beginning "and it was only subsequent because of market conditions and other items they decided to cap it off".

Denvert Levy, the Director of Assessment for the Halifax City Assessment Region was called by the Director. Mr. Levy has been employed as an assessor for about 20 years. He is responsible for the assessment of all properties in the City of Halifax including the subject property (Maritime Centre) for the years 1983 and 1984. He stated that the first 12 floors of the subject building were assessed on the basis of the income approach and the additional floors under construction on the basis of the cost approach using actual costs obtained from the owner's agent.

Mr. Levy stated that the first 12 floors were fully occupied and in use on December 1, 1982, and December 1, 1983. He stated that the use of actual costs of construction was the normal practice in assessing buildings under construction. He also indicated that it was the normal practice in the City of Halifax to assess buildings under construction and to the best of his knowledge this was the practice throughout Nova Scotia for the past 20 years since he has been involved in assessment work. He stated that the cost of materials in place as of December 1st of each year is the basis of assessing buildings under construction. He does not assess materials "lying around". When the building materials form part of a structure and are not intended to be removed they are assessed. The assessor gets his cost information by requesting it from the owner. He indicated that it was physically impossible to get all the costs by December 1st.

Mr. Levy identified a memo he had prepared which is attached to a letter dated March 27, 1986, he had sent to Counsel for the Director filed as Exhibit T-5. This memo which outlines the practice of the assessment department with respect to the assessment of partially constructed buildings reads as follows:

> "ASSESSMENT OF BUILDINGS UNDER CONSTRUCTION
>
> It has been the practice of the Assessment Department to add partially constructed buildings to the assessment roll.
>
> The normal procedure is to take the owners cost at the end of each year and adjust their cost to the base date of the most recent reassessment.
>
> The Assessment Act is very clear in Section 64(1A) that the roll shall reflect the state of the property as it existed on December 1 of each year. It is physically impossible for the Assessment Department to be at every property under construction on December 1 of each year. It has been the practice of the department to get the owners cost as close to the December 1 date as possible. In most cases the costs that the department receives are as of October 31, but in some cases, the cost is of November 30. Whichever cost is received, is adjusted to the base date and added to the assessment roll for the following year. (See listing).
>
> The assessment roll does not have to be filed until December 31 of each year, with the Municipal Clerk, but because of the computor demands at the Provincial Data Center at year end, all assessment changes for the following year have to be imputted by the end of the first week of December. This does not give the assessment department much time to be getting cost figures as of December 1 of each year and get the changes in the computor as of the 6th. or 7th. of December.
>
> The department is compelled to use whatever information is available at the time of making up the assessment for the following year."

Attached to Mr. Levy's memo is a list of six commercial properties in the City which had been assessed while under construction. The list shows the property and its location, the assessment year, the date to which costs had been obtained, the owner's costs, the dates to which costs had been adjusted, and the assessment amount.

The third and last witness to testify was Gloria McCluskey called by Counsel for the Director. Mrs. McCluskey is an Assistant Provincial Director of Assessment for the Province of Nova Scotia and has been employed in various capacities of assessment work since 1971. She is an accredited real estate appraiser and at the time of the hearing of the appeal was in charge of the technical training of assessors employed by the Department of Municipal Affairs. She was accepted by the Board as a person qualified to give opinion evidence as to the appraisal and assessment of property.

Mrs. McCluskey expressed her opinion that in assessing the original 12 storeys of a building designed to accommodate the construction of additional floors, the assessor should assess the building based on the income stream generated by the building and then add on the value of the extra capacity that has been built into the building to accommodate the construction of additional floors. This evidence was in contrast to the evidence of Mr. Levy who indicated the assessment should be based solely on the income approach. Mrs. McCluskey qualified her answer by stating that if there was no demand for additional space at the time of the assessment she would not add on value for the over capacity of the building but would deduct from the value obtained by the use of the income approach an allowance for functional obsolescence. She stated that conditions of the market could change from year to year and each year might produce a different assessment because of changing market conditions.

Mrs. McCluskey stated that the Department of Municipal Affairs' practice with respect to assessing partially constructed buildings has been to assess these buildings based on actual costs and to assess completed commercial buildings based on the income approach. She also indicated that the practice has been to apply the cost approach in assessing additions to existing commercial buildings.

Following the completion of the evidence Counsel for the Appellant, the Director and the City presented oral argument on the question of the assessability of the additional 7 storeys. The Board instructed Counsel to file written briefs by May 1, 1986 and May 12, 1986, was set as the last day for the filing of rebuttal briefs.

The question for the Board's determination is whether or not the additional construction in place on December 1, 1982 and December 1, 1983 is "assessable property" within the meaning of those words contained in Section 1(a)(v) of the Assessment Act, R.S.N.S. 1967, Chapter 14. The evidence is clear that on these two dates there was in place on the subject land a completed 12 storey building fully occupied by tenants and consisting of 12 stories of office space plus a shopping mall and underground parking, known as the Maritime Mall. It is also clear from the evidence that construction of an additional 7 stories to be superimposed on top of the existing 12 storey building was in progress on December 1, 1982 and December 1, 1983. It is also perfectly clear from the evidence that on those two dates none of the additional storeys under construction was in a state of completion which would permit occupation by tenants. The question of whether the additional construction in place on the two dates December 1, 1982 and December 1, 1983 adds value to the property in question is not in issue at this point of time, only the question of assessability of this property is in issue.

The basic facts of this case are not in dispute although the parties to this appeal could not agree on a date that the subject building was substantially completed. The seven additional storeys of the building were neither completed nor were they occupied on the relevant dates of December 1, 1982 and December 1, 1983 which are the effective dates for assessment purposes for the assessment years 1983 and 1984 respectively in accordance with Section 64(1A) of the Assessment Act. Subsection (1A) of Section 64 reads as follows:

> "The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll."

Counsel for the Appellant submits that it is irrelevant that the practice of the Assessment Department for the past twenty years has been to assess buildings under construction. He argued that the thrust of his submission is that "we are dealing with circumstances in the past tense". He stated that the words used in the Assessment Act defining "assessable property" are the verbs "erected or placed" and there is the concept in Section 1(a)(v) of buildings and structures "erected". He referred to the 1984 amendment to the Assessment Act (S.N.S. 1984 c. 15) which added to clause (v) the words "including buildings and structures under construction or partially constructed". This amendment, he argued, strengthened his argument that clause (v) prior to the amendment could only mean buildings already erected and does not include partially constructed or erected buildings.

The Appellant submits that construction must be completed in order to constitute a "building" and in its Pre-Hearing Memorandum offers two definitions of a building. Firstly, from Black's Law Dictionary, a building is defined as "an edifice", "a structure", "a fabric built or constructed", and "that which is built". Secondly, the Shorter Oxford Dictionary defines the word "building" as "the action of the verb build" and "that which is built; a structure, edifice".

The Appellant submits that each of these definitions "refers to a structure or edifice which has been constructed (in the past tense) and implies that completion is necessary to give the structure or edifice the characteristics of a 'building'".

Counsel for the Appellant further submits that the additional construction completed on December 1, 1983, and December 1, 1984 could not be assessed as a "structure" because that term "implies something constructed to that degree of completion which would enable it to perform its intended function" and would not "apply to partially assembled components of an uncompleted project". On this point Counsel for the Appellant rely on the decision of the Court of Appeal of the Supreme Court of British Columbia in the case of Cominco Ltd. v. Assessor of Area No. 18 Trail Grand Forks [(1984), 1 D.L.R. (4th) 663].

Counsel for the Appellant in their Pre-Hearing Memorandum submit that "on a clear reading of Section 1(a)(v), therefore, it is respectfully submitted that the seven additional floors are not "assessable property" and accordingly ought not to be assessed nor included in the determination of the value of the property for assessment purposes".

Counsel for the Appellant submit that the Board should rely on the decision of the British Columbia Court of Appeal in MacMillan Bloedel Ltd. v. Assessor of Area Number 07-Sunshine Coast (1984) 1 D.L.R. (4th) 663, in determining whether buildings and structures under construction or partially constructed are assessable property. In that case the B.C. Court of Appeal had to interpret the meaning of some portions of the British Columbia Assessment Act.

The British Columbia Court of Appeal because of issues common to both appeals dealt with two separate appeals by Cominco Ltd. and MacMillan Bloedel Ltd. in one decision given by Taggart J.A. dated September 13, 1983. The principal issue in each appeal relates to the assessability of "improvements" made by the companies to their industrial plants. Taggart J.A. states at Page 664 that "In each appeal the arguments focused on the meaning to be given the words used in the Assessment

Act, R.S.B.C. 1979 c. 21 (the Act) s.1, to describe 'improvements'".

The following is the definition of "improvements" contained in the British Columbia Assessment Act, viz:

> "'Improvements' for purposes other than for general municipal and provincial taxation purposes under the Municipal Act, Vancouver Charter and Taxation (Rural Area) Act includes
>
> a) all buildings, fixtures, machinery, structures and similar things erected or placed in, on, under or affixed to land or to a building, fixture, or structure in, on under or affixed to land...".

Taggart J.A. in his decision indicated that in each of the appeals the Court was concerned with the meaning to be given to the language set forth in that portion of paragraph (a) above.

Taggart J.A. states in his decision at Page 665 that "The Act requires the assessor to complete the assessment roll by December 31st of the year preceding the year in which taxes will be levied. In these cases MacMillan and Cominco had begun the construction of additions to very large industrial plants. By the end of 1980 substantial amounts of money had been spent on the additions but the whole of the work had not been completed. In each case the assessor valued the fixtures, machinery, structures and similar things by taking the estimated final cost of the additions and applying to it a factor equivalent to the estimated degree of completion of the additions. For example, in the MacMillan case the estimated final cost of the additions was $105,000,000. It was estimated the additions were 80% complete at the end of 1980. The assessor therefore valued the additions at $84,000,000 for the 1981 taxation year."

MacMillan and Cominco each appealed the assessments and ultimately the appeals reached the Assessment Appeal Court. Each of the appeals was dismissed. MacMillan and Cominco each appealed to the Supreme Court by way of stated cases. Each was heard by a different Judge of the Supreme Court of British Columbia and both of these appeals were dismissed. Leave to Appeal these decisions to the Court of Appeal was granted under Section 74(7) of the British Columbia Assessment Act which makes provisions for an appeal on a question of law to the Court of Appeal with leave of the Court.

Taggart J.A. stated at Page 672 that what is really in issue is the construction of the definition of improvements and that "what was said in Tisdale (TP) v. Hollinger Consolidated Gold Mines Ltd. [1933] S.C.R. 321 is apt. At Page 323 Cannon J. said:

> 'The construction of a statutory enactment is a question of law while the question of whether a particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.'"

Taggart J.A. expressed the Court's opinion at Page 673 that the Assessment Act of British Columbia "is an integral part of the statutory scheme whereby taxes are levied on real property and improvements. As part of that scheme it is to be construed in the same way as a taxing statute", that is, strictly construed. His conclusion stated at Page 673 was that the principles governing the interpretation of the Assessment Act are "that if the words of the statute are in themselves precise and unambiguous they are to be construed in their ordinary sense. If the imposition of the tax is not shown clearly and without ambiguity the construction should be in favour of the taxpayer."

Taggart J.A. in his decision states at Page 674 that the first three lines of paragraph (a) in the definition of "improvements" must be looked at in their entirety to ascertain the meaning to be given to them. He goes on to say that:

> "When that is done and the verbs and nouns given their ordinary meanings I think the sense is that machinery and structures and similar things only become subject to assessment when they have been erected or placed. The verbs are used in the past tense which shows it is only when a piece of machinery or a structure has been completed in all essential respects, that is to say, it has been placed or erected in its final position and is capable of being used for the purposes for which it is designed, that it becomes subject to assessment as an improvement.
>
> That is the sense given to the nouns by Wallace J. [the Supreme Court Trial Judge in the Cominco case]. I agree with his conclusion that the term 'structure' does not apply to partially assembled components of an incomplete object; and with his conclusion with respect to "machinery" that it does not include component parts of an incomplete assembly which cannot perform the intended function of the assembly when completed. Support for those conclusions is found in the Trans Mountain Oil Pipeline and John Labbatt cases in so far as structures are concerned; and in the Northern Broadcasting Company and John Labatt cases in so far as machinery is concerned. While Wallace J. considered the nouns in isolation from the verbs I think when taken together in the context of the definition as a whole the correct construction is that which he gave.

> Thus far I have limited my consideration of the definition of 'improvements' to the first three lines of paragraph (a). Support for my conclusion as to the meaning of improvements may be found in the remainder of the paragraph where things which are improvements are set out. I think these things are not improvements until they are essentially completed, that is to say, they have been placed or erected in their final positions and are capable of being used for the purposes for which they were designed. I refer in this connection to the words 'acqueducts', 'tunnels', 'bridges', 'dams', 'reservoirs', 'roads', 'transformers' and 'storage tanks'. Thus an acqueduct is not an acqueduct until it can conduct water; a dam is not a dam until it can hold back water; a bridge is not a bridge until it is connected at each end. A similar approach can be taken to the remainder of the words to which I have referred."

Taggart J.A. in commenting on whether fixtures are assessable as improvements stated at Page 675:

> "I would apply to fixtures the same reasoning I did when dealing with structures and machinery and reach the same conclusion, viz. it is only when a fixture has been completed in the sense that it has been placed, erected or affixed in its final position and is capable of being used for the purposes for which it is designed that it becomes subject to assessment as an improvement."

Taggart J.A. concludes his decision by stating at Page 676 that "with respect to the interpretation of 'improvements' it is my opinion that when the Statute is read as a whole with its purpose in mind, the words used to define improvements do not clearly and unambiguously make the things in dispute in these two appeals assessable".

It is to be noted that The Supreme Court of Canada refused an application for leave to appeal the British Columbia

Court of Appeal decision written by Taggart J.A. in the MacMillan Bloedel case.

Counsel for the City in her pre-hearing memorandum submits that at the time of the 1983 and 1984 assessments of the subject property assessable property as defined in the Assessment Act means "buildings and structures erected or placed upon, in, over, under or affixed to land" and that the subject property comes within the definition of a building set forth in the 4th edition of Black's Law Dictionary, viz: 'A structure or edifice inclosing a space within its walls, and usually but not necessarily, covered with a roof.' She also referred to the definition of "building" in the Shorter Oxford English Dictionary viz: 'that which is built; a structure, edifice'. She also referred to the Shorter Oxford English Dictionary definition of "structure" viz: 'that which is built or constructed; a building or edifice of any kind...a fabric or framework of material parts put together'. She submits that the word "building" as used in the Assessment Act is express, plain and clear.

In her pre-hearing memorandum Counsel for the City refers to the decision of the British Columbia Court of Appeal in the MacMillan Bloedel and Cominco cases. She commented that "The problem faced by the court was at what point did a piece of equipment become assessable. The only logical point in time is the point at which it becomes operational as part of the system it was designed to serve. It is submited that it was in this context that the decision of Taggart, J.A. was rendered.

This scheme being already clearly established in Nova Scotia by virtue of the provisions of s. 1(a)(vi), it is clearly a different statutory context in which the question of the meaning of s. 1(a)(v) is to be examined in the case of the Maritime Mall".

Counsel for the City makes the following comment respecting the 1984 amendment to s. 1(a)(v) of the Assessment Act, viz: "With respect to the subsequent amendment to s. 1(a)(v) of the Assessment Act, it is submitted that the words 'including buildings and structures under construction or partially constructed' were added 'ex abundanti cautella (from an excess of caution)'. That is to say, they were added to make sure that property owners realized that any partially constructed buildings or structures were liable to be assessed."

Counsel for the City referred the Board to Section 24(2) of the Interpretation Act, R.S.N.S., 1967, c.150 which states that:

> "A re-enactment, revision, consolidation or amendment of an enactment is not to be construed as an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language."

She then submits that:

> "Therefore the subsequent amendment has no bearing on what interpretation was given to the Act prior to the amendment, when partially constructed buildings were assessed."

The Pre-Hearing Memorandum filed by Counsel for the Director states that:

> "It is the position of the Province

> that the building, as it existed on December 1, 1982, is assessable property under Section 1(a)(v) of the Assessment Act. Likewise, the building as it existed on December 1, 1983 constitutes assessable property."

Counsel for the Director submits that Section 1(a)(v) of the Assessment Act is perfectly clear in its provision that buildings and structures are assessable property and that the section is not qualified by any reference to function or purpose. She submits that:

> "There is no requirement that the building or structure be operational or that it be capable of being occupied or that it be completely finished in every respect or in most respects. To conclude that in order to be assessable under Section 1(a)(v) a building or structure must be complete, or in other words, that part of a building which is incomplete is not assessable, is in our opinion reading something into the legislation which is not there and which is not intended to be there".

After referring to Section 64(1A) of the Assessment Act (quoted on page 16 of this decision) Counsel for the Director submits that:

> "There is no qualification in that Section, with regard to completion and function, and indeed the section, in our submission, anticipates unfinished buildings or structures."

With respect to the amendment to Section 1(a)(v), Counsel for the Director submits that by virtue of Section 24(2) of the Interpretation Act, the amendment "ought not to be construed as an adoption of the construction placed upon language in the British Columbia legislation" and "In any event, at the relevant time for assessment purposes, the Act had not been amended and the Board may not not be able to consider a subsequent amendment".

The Pre-Hearing Memorandum filed by Counsel for the Director concludes by stating that "the MacMillan Bloedel and Cominco cases dealt only with machinery and whether it should be assessed before it was fully operational. In Nova Scotia machinery must be part of the operational unit before it is assessable. Any attempt to further extend the British Columbia cases as argued by the Appellant would be unreasonable, in our submission".

In order for the value of the additional construction to the subject building which was in place on December 1, 1982, and December 1, 1983, to be assessed for the 1983 assessment year and the 1984 assessment year respectfully, this construction must constitute "assessable property" within the meaning given to these words by Section 1(a)(v) of the Assessment Act, as it read in December of 1982 and December 1983 when the assessment under appeal were made.

The evidence is clear that on December 1, 1982, and December 1, 1983, the first twelve floors of the building were occupied by tenants and construction of the additional seven storeys was under way but no portion of the additional seven storeys was ready for tenant occupancy on either date.

It is the opinion of the Board that prior to the commencement of the construciton of the additional seven storeys there was in fact a twelve storey building erected on the subject land and this building was fully occupied by tenants and constituted "assessable property" within the definition set forth in Section 1(a)(v) of the Assessment Act. There is no dispute as to the assessability of the first twelve storeys. The dispute relates to the question as to whether the partially completed additional stories in place on December 1, 1982, and December 1, 1983, are assessable property. It is obvious that the additional stories in place on the dates when the assessments for the years 1983 and 1984 were to be effective do not in themselves constitute "buildings" as that term has been defined by various dictionaries including Black's Law Dictionary and the Shorter Oxford Dictionary. A more difficult question is whether this additional construction, although not completed, can be said to form a portion of the existing building or an extension of the existing building. If it does, then it is part of a building and is therefore assessable by virtue of being a part of a building. What in fact was erected or placed on the subject land on the relevant dates for assessment purposes for the years 1983 and 1984 was clearly a building consisting of twelve stories fully completed and not only capable of being occupied by tenants but actually occupied by tenants plus some additional construction superimposed on top of the twelve storey portion of the building which at the relevant times was incomplete and was not suitable for tenant occupation. It is the opinion of the Board that the additional stories actually constructed although not suitable for tenant occupation, nevertheless form part of an existing building and the building is assessable property as a building erected or placed upon the subject land.

The fact that some portion of the building is incomplete and not ready for tenant occupation does not, in the Board's opinion, have any material effect on the fundamental fact that there is an existing building erected or placed upon land. Even if the additional construction added to the first twelve storeys does not form part of an existing building it could nevertheless be said to be a "structure" erected or placed upon, in, over or affixed to land and is accordingly assessable as a "structure" under the definition set forth in Section 1(a)(v) of the Assessment Act. Structure has been judicially defined by Denning, L.J. in Cardiff Rating Authority v. Guest Keen Baldwins Iron and Steel Company Ltd. [1949] 1 K.B. 385 (C.A.) at page 396 as follows:

> "A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be moveable... A thing which is not permanently in one place is not a structure."

Black's Law Dictionary, 5th ed. defines "structure" as:

> "Any construction, or any production or piece of work artifically built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind.
>
> A combination of materials to form a construction for occupancy, use or ornamentation whether installed on, above, or below the surface of a parcel of land."

It is the opinion of the Board that all buildings are structures but structures are not necessarily buildings.

To constitute assessable property under the definition set out in Section 1(a)(v) of the Assessment Act, the property must be either a building or a structure or both.

In the case of the appeal by A.W. Peters Enterprises Ltd. the Board was confronted with the question as to whether bowling alleys supported only by their own weight and located in the Appellant's building constitute "assessable property". The decision of the Board in that case is reported in Vol. Three A of the Board's decisions made in 1984 at page 330.

In the Peter's case, the Board stated at page 350 of its decision that:

> "...for any property to be assessable under the definition of Section 1 the property must be that type of property included in the expression, 'building and structures erected or placed, upon, in, over, under or affixed to land'."

"Property" is a word with a wide variety of meanings. "Black's Law Dictionary (5th ed.) defines it in various ways including:

> "The exclusive right of possessing, enjoying and disposing of a thing"

and

> "The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate."

The additional construction to Maritime Centre is undoubtedly "property" within the definition of property in Black's Law Dictionary. If this additional construction is in fact a part of the subject building or is a "structure" superimposed on an existing building it would ostensibly become assessable property.

The evidence is clear that the additional construction in place on December 1, 1982 and December 1, 1983 was physically attached to and part of the twelve storey building previously in existence. It is also clear that this additional construction had a real value at these relevant dates and the Appellant admits that it constitutes valuable property. The Appellant, of course, denies that this additional property constitutes assessable property based on the argument that to be assessable property under Section 1(a)(v) a building must be completed at least to the point where it may be occupied. The Appellant also contends that the additional construction is not a structure because it was not constructed to the degree of completion which would enable it to perform its intended function.

The Appellant also strongly submits that the words "erected or placed" found in Section 1(a)(v), have great significance in indicating that a building or a structure must be completely erected or fully built to constitute assessable property. The Appellant submits that for the purpose of interpreting Section 1(a)(v) there is a great distinction between a building already erected that is, completed, and one that is still under construction or partially completed.

The Appellant in its Post Hearing Submission states that:

> "In addition, for "buildings" or "structures" to be "assessable property" within the meaning of Section 1(a)(v) of the Assessment Act they must be erected or placed upon the land because

> buildings and structures only become subject to assessment when they have been erected or placed. These verbs are used in the past tense thereby denoting an item completed in all essential respects, that is to say, placed or erected in a final position and capable of being used for the purposes for which it is designed.
>
> The significance of the use of the past tense by the legislature cannot be overlooked. Had the legislature intended the verbs to apply in circumstances in which buildings or structures were in the process of being erected or in the process of being placed upon the land the present tense would have been utilized.
>
> On a clear reading of Section 1(a)(v), therefore, it is respectfully submitted that the seven additional floors are not "assessable property" and accordingly ought not to be assessed nor included in the determination of the value of the property for assessment purposes."

In the Peter's case, the Board rejected the Respondent's argument that the meaning and intent of Section 1(a)(v) is not clear and therefore the taxpayer (Respondent) should be given the benefit of the doubt and should not be assessed. This argument was raised by the Appellant in the present case and the Board rejects it. The Section is clear that if there is a building or a structure which has been either erected or placed in, on, over, under or affixed to land, then that building or structure is assessable. What constitutes a building or structure in any given factual situation is a question which the Board must determine. In this case at hand, the Board finds on the evidence that there is in fact one building erected on the subject land and superimposed on and forming part of that building are some additional stories albeit they were not in a fully completed state at the relevant dates of assessment for 1983 and 1984.

It is the opinion of the Board that the proper interpretation of a statute is set forth in the decision of Tysoe, J.A. given on behalf of the British Columbia Court of Appeal in Re Simon Fraser University and District of Burnaby (1968) 1 D.L.R. (3d) at Page 430 where he states:

> ".....If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature".

Counsel for the Appellant submits that this Board ought to give great weight to the decision of the British Columbia Court of Appeal in the MacMillan Bloedel case. They do not suggest that the Board is bound by that decision only that it should be given great weight.

It is the Board's opinion that it is not bound by the decision of the British Columbia Court of Appeal although the Board would undoubtedly give proper "weight" to its decisions if relevant to a matter before the Board. By relevant, the facts must be similar to those under consideration by the Board and the Statutory provisions to which those facts are applied must be identical or essentially similar to the Nova Scotia Statute. As is pointed out in the City's Post Hearing Submission, the Assessment Act of Nova Scotia differs from the Assessment Act of British Columbia in many relevant respects. The Nova Scotia Act deals with machinery and equipment etc., as assessable property under Section 1(a)(vi) but only on the basis that it forms "an integral part of an operational unit.....". Buildings and Structures are dealt with under a separate Section 1(a)(v) which does not require them to "form an integral part of an operational unit...." as is the case for machinery and equipment.

The relevant section of the British Columbia Assessment Act considered by the Court of Appeal in the Bloedel and Cominco cases in defining "improvements" does not state that the improvements including machinery must be "part of an operational unit". The British Columbia Court determined that the concept of completeness was essential in deciding whether improvements were assessable. The Board agrees with the City's submission set out on Page 14 of its Post Hearing brief which states that:

> "Obviously the Nova Scotia Legislature has distinguished between the degree of completeness required for assessability by requiring operational status of machinery but since the legislature found it necessary to specify operational status instead of simply using the words erected or placed as in paragraph 1(a)(v), the words are used in a different sense than in the British Columbia legislation.
>
> In MacMillan Bloedel and Cominco the Court had to determine when an 'improvement' - a term which has a meaning, but which meaning can be narrowed through definition - becomes subject to assessment. In contrast, in this appeal the Board has to interpret the meaning of a phrase, 'assessable property', which had to be defined in the Act".

As has already been stated in this decision, Counsel for the Appellant brought to the Board's attention the fact that the Legislature of the Province of Nova Scotia had seen fit to enact in 1984 (Ch.15) an amendment to Section 1 of the Assessment Act which added immediately following the word "land" in the third line of Subclause (v) of Clause (a) the words and punctuation ", including buildings and structures under construction or partially constructed". The Appellant submits that this amendment must be considered "only as an aid to the interpretation of Section 1(a)(v) as it was in 1982 and 1983 and that this amendment "was enacted as a response to the determination of the meaning of the words 'buildings or structures erected or placed' by the British Columbia Court of Appeal....".

It is only speculation on the part of the Board as to why the 1984 amendment was passed by the Legislature. Counsel for the Appellant suggests it was done to clarify the intent and meaning of Clause (v) which they argue was ambiguous and unclear prior to the amendment. Counsel for the City and the Director argue that the clause was clear and that the Legislature passed the 1984 amendment "ex abundanti cautela" that is, from an excess of caution, rather than to broaden the scope of the clause. Counsel for the Appellant also suggest that the amendment was enacted because of the interpretation placed on words in the British Columbia Assessment Act which were similar to the wording in Section 1(a)(v) of the Nova Scotia Assessment Act.

Section 24(2) of the Interpretation Act, R.S.N.S. 1967, c.151, is relevant as to the question of the interpretation of Section 1(a)(v) of the Assessment Act. It reads as follows:

> "A re-enactment, revision, consolidation, or amendment of an enactment is not to be construed as an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language".

The Board agrees with the Submission of Counsel for the City set out on Page 24 of her Post Hearing Brief where she states that:

"Therefore the subsequent amendment has no

> bearing on what interpretation was given to the Act prior to the amendment and should not be relevant to a case dealing with a matter arising before the amendment".

The evidence of both Denvert Levy and Gloria McCluskey is clear that the assessment practice in Nova Scotia for the past twenty years has been to assess partially completed buildings. The Chairman of the Regional Assessment Appeal Court in his decision dated August 27, 1985 refers to this assessment practice as being "another pertinent point" in forming his conclusion that the partially constructed additional floors of the building constitute assessable property. Counsel for the Appellant submit that "such a consideration is clearly irrelevant to the determination of assessability of such partially completed buildings or structures". The Board agrees with the Appellant's submission that the practice of the Assessment Department even over a lengthy period of time does not necessarily indicate that the practice is correct and in compliance with the provisions of the Assessment Act. However, in this instance, the practice of the Assessment Department in assessing partially constructed buildings is in keeping with the Board's interpretation of the provisions of the Assessment Act and in particular Section 1(a)(v).

In the Board's opinion, Section 64(1)(a) of the Assessment Act gives support to the submission of the Director that a partially constructed building is assessable property as that Section indicates that the assessment "shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll". (emphasis added). To be assessable property under Section 1(a)(v) there must be a building or a structure erected or placed on the land which is clearly the situation at hand and the "state" or condition of the building or structure "as it existed on the first day of December..." is what must be shown on the Assessment Roll. In other words, the assessor must assess the subject building as it was on the relevant dates of December 1, 1982 and December 1, 1983. On both of these dates there was a building erected on the subject land although a portion of this building was still under construction on both relevant dates.

In summary, the Board is of the opinion that the unfinished portion of the subject building is in fact a portion of the erected building and is part of the property which is assessable pursuant to Section 1(a)(v).

The Board will reconvene the hearing of the appeal in order to hear evidence with respect to the Board's determination of the amount of assessment of the Appellant's property for the 1983 and 1984 assessment years.

The Board will consider the matter of costs at the conclusion of the hearing of the evidence on the question of valuation.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 25th day of July, A.D., 1986.

RHBlois

R.H. BLOIS, Chairman

EASalton

ELIZABETH SALTON, Vice Chairman

RICHARD L. WELDON, Member.

NOVA SCOTIA MUNICIPAL BOARD.

City of Halifax v. Bank of Nova Scotia et al

ASSESSMENT--WHETHER DATA PROCESSING EQUIPMENT "ASSESSABLE PROPERTY"--WHETHER EQUIPMENT IS USED IN "PROCESSING" OR "MANUFACTURING"--ASSESSMENT ACT, S. 1(a)(vi)--MUNICIPAL BOARD ACT, S. 16(1)

This is a consolidated hearing of three appeals by the City of Halifax from decisions of the City of Halifax Regional Assessment Appeal Court respecting the 1984 and 1985 assessments of data processing equipment used by three banks. The Regional Court held that machinery and equipment used to process data and banking documents are not assessable property as defined in s. 1(a)(vi) of the Assessment Act. This hearing concerns only assessability and not valuation.

HELD: The appeal is dismissed. The banks and the Director will have their costs taxed (the banks in one bill) on a party and party basis on the County Court scale.

The Board must decide if the computer room equipment of the banks is assessable within the meaning of s. 1(a)(vi) of the Assessment Act as it was in force for 1984 and 1985. This provision defined "assessable property" as, inter alia, "machinery, equipment ... and other things ... that form an integral part of an operational unit designed for or used in processing or manufacturing...." The parties acknowledge that the appeals involve "equipment" that forms an integral part of an operational unit designed to carry on the banking business. The facts and law thus bring the present appeal down to a rather narrow issue: what meaning did the Legislature intend when it used the words "processing" and "manufacturing." The Board holds the opinion that the word "manufacturing" used by the Legislature conveys a meaning that the manufacturing contemplated was designed to lead to a good for sale. Cancelled cheques, bank statements, etc. are not goods made ready for sale and do not fall within the meaning of "manufacture." The operations of the banks in this appeal are the provision of services rather than goods. Services are not manufactured. "Process" includes, in a general meaning, almost any conceivable organized going-on. To use an analogy of the Board's own, every typewriter in every office in Halifax would under this use of the word be assessable property. The Legislature in the past repealed the assessment of personal property of businesses and replaced it with a business occupancy assessment, and so did not intend such a broad meaning. In s. 1 (a)(vi) itself we find words such as "machinery", "operational unit", and "different lines of production" which give a flavour of meaning inimical to the interpretation the City would have us place on "process." The computer room equipment is designed primarily for the purposes of providing banking services. To be assessable property the equipment would have to be designed primarily for the purpose of an enterprise the objective of which was providing goods.

Note

The City of Halifax was granted leave to appeal. The Appeal Division of the Supreme Court of Nova Scotia dismissed the City's appeal. (See 1986 S.C.A. No. 01695).

NSMB-128-129-130-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: A consolidated appeal by the CITY OF HALIFAX, Appellant, from three decisions of the Regional Assessment Appeal Court, Halifax City Assessment Region, made on November 7th, 1985, respecting three several lots of data processing equipment respectively located at 1809 Barrington Street, Market Street Mall, and 1680 Grafton Street, all in the City of Halifax.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH SALTON, Vice-Chairman
RICHARD L. WELDON, Member

COUNSEL: MARY ELLEN DONOVAN, LL.B., for the City of Halifax, Appellant;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment, a Respondent;

DAVID A. MILLER, LL.B., and ERIC L. BURTON, LL.B., for the Royal Bank of Canada, Canadian Imperial Bank of Commerce, and Bank of Nova Scotia, Respondents

VINCENT F. LAMBIE, LL.B., for the Nova Scotia Municipal Board.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, The Chairman assigned himself, Vice-Chairman Elizabeth Salton and Board Member Richard L. Weldon to hear these consolidated assessment appeals respecting the 1984 and 1985 assessments of data processing equipment (used by, respectively, the Canadian Imperial Bank of Commerce, the Bank of

Nova Scotia, and the Royal Bank of Canada) at the Board's February 26, 1986 sittings at the Board Room of the Expropriations Compensation Board, Suite 904, 9th Floor, Centennial Building, 1660 Hollis Street, Halifax, N.S. These appeals are made by the Appellant, on three several notices filed with the Board November 27th, 1985 and all dated November 26th, 1985.

The Appellant seeks to have the Board reverse three decisions of the Chairman of the Regional Assessment Appeal Court all made November 7, 1985 finding that machinery and equipment used to process data and banking documents is not assessable property as defined in Section 1(a)(vi) of the Assessment Act, R.S.N.S. 1967, Chapter 14, as amended. All three notices of appeal state as a ground of appeal "That the Chairman of the Regional Assessment Appeal Court erred in holding that the machinery and equipment used to process data and banking documents is not assessable property as defined in Clause 1(a)(vi) of the Assessment Act."

The appeal came on for hearing at 10:00 A.M. on February 26, 1986 in the Board Room of the Expropriations Compensation Board pursuant to the Notice of Hearing dated the 24th day of January, A.D., 1986.

Service of the Notices of Appeal and the Notice of Hearing were all proven to the satisfaction of the Board.

All parties present at the hearing agreed that the Appellant had a right to Appeal and that the Board had jurisdiction to hear the appeal at least as to the 1985 assessment on the issue of whether or not the property in question should be assessed at all. Counsel explained that there was a current collateral attack in the Supreme Court Trial Division based on the timeliness of the City's appeals of the 1984 assessments to the Regional Assessment Appeal Court. The Board held that it had no jurisdiction to inquire into that issue.

Those 1984 assessments are also amongst the assessments before the Board in this appeal. In respect to the 1984 assessments complained of, the Board only had jurisdiction to ascertain the date on which notice of the relevant decisions of the Regional Assessment Appeal Court were received by the Appellant and decide whether or not the appeals to the Board were timely. In this appeal the Notices of Appeal to the Board were timely within that meaning as well for the 1984 assessments as for the 1985 assessments. The evidence relevant to both the years 1984 and 1985 as to the issue of assessability or non-assessability is essentially the same for each year so the Board determined, with the consent of all counsel present, to hear the same evidence concerning both years. Counsel agreed that it would be more expeditious to hear evidence on valuation of the property in question only after the issue of assessability had been determined by the Board and then only if the Board determined that there was assessable property to be valued. These separate issues lent themselves easily to two separate hearings. The Board assumed jurisdiction to hear this appeal.

Ms. Donovan called Robert Peter Weeden, Dr. Ernst Grundke, Barry D. Woodworth, and Bernard G. Smith as witnesses for the Appellant. Mr. Miller called Edward Janson, Larry Beal, Jerry Box, and Eugene Cawthray as witnesses for the Respondent banks. Mr. Lambie for the Board and Ms. Tyson for the Director called no evidence. Ms. Tyson at the beginning of the hearing made it quite clear that she had no present intention of calling evidence, participating in the cross-examination of the witnesses, or participating in the arguments made to the Board and she has maintained that position by participating only with her presence.

If the Board had a place in its process for hearing assessment appeals on an agreed statement of facts, this is probably an appeal in which such a statement of facts could have been agreed upon. Since there is no such procedure presently available to the Board, it proceeded to hear the evidence de novo, as if the facts were in real dispute, and as if the evidence had not previously been canvassed before in the Regional Assessment Appeal Court.

At this stage of the decision making process when deciding the assessability of certain equipment used by the bank Respondents located in 1809 Barrington Street, located in Market Street Mall, and located at 1680 Grafton Street, the Board need not consider as germane to the one issue now being decided by the Board the differences in use, equipment and ownership of equipment between the individual Respondents and the various parties the Appellant wishes to have added to the roll: "Comdisco Canada Limited", "N.S.R. Canada Limited", and "IBM Canada Limited and Greyhound Computer of Canada Limited." The parties with the real stake in the proceedings before the Board are the ones already on the Board's record and these last listed bodies will undoubtedly respond if necessary to any result of this appeal. Similarly, although there are some differences of equipment and techniques of using that equipment, those differences are not germane to the issue of assessability and for the purposes of the balance of this decision the Board will treat the equipment in question collectively and ignore the differences of location and ownership and function as being immaterial to the issue at hand.

The equipment in question is massive and expensive. It is housed in its own climate controlled environment at a specific location [actually of course three specific locations] in the City of Halifax set aside to accommodate its installation. In this decision we will refer to this environment as the computer room. Although massive and presently requiring much protection and care the equipment in question is capable of being dismantled and removed, added to or otherwise modified, as the dictates of the rapidly changing computer technology, and the demands of the user Respondent banks require. Access and egress to the computer room is likewise designed and constructed to enable such modifications.

Outside of the computer room (and in this appeal there is no attempt to assess or in any way deal with the assessment of any linked equipment existing outside the computer room) the equipment is linked, on the "downstream side", through telephone lines and a modem or modems and "Instant Tellers" directly to bank customers or by "Teller Machines" to bank employees and through those bank employees to the bank customers. Also on the "downstream side" (although not necessarily without the computer room) are facilities for receiving, encoding, and sorting cheques presented for negotiation to the bank. At the present state of the art in banking matters the negotiation of cheques forms a large part of the volume of the banking transactions the equipment in question is designed to handle. "Downstream" as well are the "Work Station Terminal" and "Keypunch Card Center" which may be used for the provision by the bank to its customer of various services such as payroll and other accounting services.

In the case of the "Instant Teller" and "Teller Machine" information and service and even instructions to distribute money may go to the bank customer in reverse order on the same lines the original inquiries and information from the customer came into the computer room.

In the case of all inputs the necessary information gets back to the bank customer most often in the form of printed statements, cancelled cheques, demands for loan payments (all the conventional pre-computer bank output) and printouts of payrolls, pay cheques, and other accounting services used by bank customers and sold as a package to each customer who requires such service from his bank. Some of these payroll and accounting services are either a totally new service provided by a bank or a new or improved or increased version of an old service made possible by the new capacities of the banks to handle higher and higher volumes of transactions quickly and accurately because of the automation of the banking industry (business) through the installation and use of computer systems such as those under appeal.

On the "Upstream side" of the computer room are various modems and long distance communication systems (e.g. telephone lines) linking the computer room facilities electronically to a Mainframe Computer at some large Central Canadian city. The function of this Mainframe is to accept the information sent from the facilities in the computer room (and from all other terminals or facilities of the same bank wherever located), to store that information as received, sort it into individual accounts for each bank customer, do such calculations with the information as may be programmed, and send electronic copies of that information back in a usable form for the purposes of the bank customer and the various bank employees as have need of that information in servicing the customer and the corporate needs of the bank itself. Between the Mainframe and the computer room is a clear electronic two-way street and the information sent back from the Mainframe in many cases is intended and does arrive back in the possession of the bank customer.

A typical bank customer might bank at a branch of the bank in Pugwash. His cheques are cleared through the computer room in Halifax and the record of his account is maintained in a

Toronto Mainframe after having been forwarded electronically through, inter alia, the facilities contained in the computer room.

We have now outlined the functions performed by the linked equipment both "Upstream" and "Downstream" of the equipment in question which for simplicity's sake we will call from now on the computer room equipment. "Downstream", the computer room equipment, and "Upstream" taken together can make up an automated, integrated, complete system of bank accounting adequate to produce at the appropriate time and place and for the appropriate persons all the information the bank customer needs to know for his own banking purposes. At the same time the system is capable of refining and producing, for bank corporate purposes the information therein stored. In short, banking is now accounted for, and in some respects "done", in large degree by the system briefly outlined in this decision.

We shall now focus in more detail on the computer room equipment. The costly heart, or raison d'etre, of the computer room equipment is a computer called a Central Processing Unit (CPU). It is variously linked with various input machines at bank branches or bank machine locations on its "downstream" side and on its "upstream" side to the Mainframe to receive information to be returned through itself to the bank customers or employees. In the computer room itself the CPU often has linked equipment consisting of various tape or disk drives for long term outside-of-CPU memory storage. This long term storage allows for the duplication and safekeeping of that information while the CPU is transmitting the information duplicated to the Mainframe or elsewhere as it is needed. This storage also allows the CPU to put the stored information temporarily aside while it uses its relatively limited working memory dealing with other more pressing information and then conveniently retrieving that longer termed stored information when the CPU requires it. Either "Downstream" or in the computer room there would be an encoder and proof machine to do work on the cheques to make the cheques machine readable and to make sure the cheques have been accurately encoded. In the computer room, there is a Reader/Sorter, Control Number Placer and Microfilmer and these machines (or equipment) combined do four main functions:

1. They cancel the cheques, a traditional banking function.
2. They microfilm the cheques for future ability to prove the transaction represented by the cheques.
3. They sort the cancelled cheques for distribution to their final destination (the customer of the instant institution or some other banking institution).
4. They translate the relevant banking information the bank wishes to be so input into electronic impluses and inputs those impulses into the working memory of the CPU.

The CPU then can perform with this information whatever activity it is programmed to do which includes, as its main function, the storage of that information until it becomes appropriate to send the information in question at high speed to the Mainframe-usually on a daily basis.

In the computer room to assist the CPU in this function are various other machines (or equipment), a Communications Controller/Multiplexer Data Adapter on line with a Matrix Switch and possibly an in-house Modem to allow the CPU a electronic working link with the Mainframe. This link is, as well, capable of handling information sent by the Mainframe and directed to the CPU.

Printers, bursters, and decollaters are machines (or equipment) located in the computer room linked to the CPU and are used in the preparation, dissemination and sorting of information emmanating from the CPU in a readable format - usually print. These machines (or equipment) produce, inter alia, payroll cheques, payrolls, monthly statements, and daily reports for the use of the various branches. These functions could be done by the Mainframe but at the present state of the art in the dissemination of information in print it makes better economic sense to have the necessary information sent electronically from Toronto/Montreal to Halifax and there reduced to addressed printed reports which are then couriered or mailed to their regional recipient branches or bank customers.

The CPU appears to be a large size general purpose type of computer programmed at present by the bank for the limited type of banking and accounting uses outlined above and capable of being used in many and varied uses in addition to those to which it is put. In summary, the functions the banks' CPU currently performs could with adequate accuracy be stated as follows:

1. It collates in Halifax all the banking information of all the banking transactions of the bank in the region.
2. It stores that information until it sends it at hyper-speed to the Mainframe in Toronto.
3. It sends back to the original sources of the information (or elsewhere if required) any information it may receive back from the Mainframe required to be so sent in a form usable to the banking business.

The computer room equipment, linked to the room as described, severable as described, and of a substantial nature as to cost, usefulness, and value as described, make up the property which the Board, in this appeal, must decide is either assessable or non-assessable within the meaning of Section 1(a)(vi) of The Assessment Act being R.S.N.S. 1967 c.14 as it was in force at the time for setting the assessment for the Assessment Years of 1984 and 1985 and which at that time read in full as follows:

> "1. In this Act,
>
> (a) "assessable property" means:
>
> (vi) machinery, equipment, applicances and storage and working tanks, and other things, including the supporting foundations and footings that form an integral part of an

> operational unit designed for or used in processing or manufacturing except where different lines of production are used in a food processing operation for processing perishable crops at different times in the year, then only the machinery, equipment, appliances storage and working tanks, and other things used in the line or lines that are in use for the greater part of the production;"

and the portions of that legislation that particularly apply to this appeal have been underlined by the Board.

The Appellant's position is simple and clear.

1. The computer room equipment is either equipment or machinery or some mixture of both.
2. The computer room equipment forms an integral part of an operational unit designed, or used, for a purpose, namely the carrying on of the banking business as sketched out above in this decision.
3. The purpose for which the operational unit was designed (or used for) was:
   (a) processing, or
   (b) manufacturing, or
   (c) both

and that, having thus met the criteria of "assessable property" set out in the cited sub-section of the Assessment Act the computer room equipment is assessable property and ought to be added to the assessment rolls against the names of its appropriate owners and given an appropriate assessed value for each of the assessment years 1984 and 1985.

The Respondent banks' position may be summarized as follows:

1. The computer room equipment is either equipment or machinery or some mixture of both.
2. The computer room equipment forms an integral part of an operational unit designed, or used, for a purpose, namely the carrying on of the banking business as sketched out above in this decision.
3. The purpose for which the operational unit was designed (or used for) is for the purpose of providing services of a banking and accounting nature.
4. The purpose mentioned in 3 (supra) is not manufacturing within the meaning of the Assessment Act.
5. The purpose mentioned in 3 (supra) is not processing within the meaning of the Assessment Act.

The Respondent banks argued that the operational unit merely provides traditional banking services more efficiently and that the main change from traditional quill and ledger type of banking was the ability to handle the incrementally increased number of banking transactions made necessary by the increase in population and the incrementally increased number of banking transactions per capita in the modern world.

Banks' counsel conceded that the bank was now able and did perform and sell certain accounting and payroll services including the issuance of payroll cheques directly to employees that were in addition to services not previously provided by banks, but that extra service was a small part of the banks' business and, in any event, was the provision of a service for hire and not the provision of a good for sale. In short, the banks argued, that the word "manufacturing" does not really enter into this appeal and that the work "processing" as it is used in Clause (a)(vi) of Section 1 of the Assessment Act means the processing of some good for sale and not the processing of information which they say the equipment in the computer room allows them to do.

The thrust of the Appellant's argument is that the operational unit did in fact manufacture a product for a price to be sold to a customer. It adduced evidence to show that the cancelled cheque (probably the most numerous of the tangible products produced by the equipment in the computer room) was a good taken into the line of production, worked upon by the equipment therein contained, changed therein returned as, for hire, a changed and different good for the customer who wrote it and now wants it back cancelled.

Appellant's counsel further argued that the payroll cheques, direct mailings, and bank statements to customers were also goods manufactured by the use of the assistance of the equipment in the computer room and that all these products were goods produced for hire for customers of the bank and thus met even the criteria of assessability resulting from the Respondent banks' interpretation of the relevant law to the facts of this appeal.

In any event, the Appellant argued that the Assessment Act had no such criteria or provision requiring the eventual product of a good for sale either by process or by manufacture. She argued that to be assessable the equipment in the computer room merely had to be part of a processing unit which wasn't agricultural. According to the arguments of the Appellant's counsel the fact that mostly information was being processed for hire and not goods was immaterial in the proper construction of the relevant portion of the Assessment Act.

On the other hand, banks' counsel argued that the Board should in its deliberations have regard for the interpretations put on the word "processing" in various cases decided under the Income Tax Act where the meaning of the word "processing" was narrowed to the meaning of processing of goods for sale.

The facts on which the decision is to be based are essentially as set out in this decision.

The facts and the law seem to bring the present issue before the Board down to a rather narrow issue: In the context of the facts of this appeal and the cited subsection of the Assessment Act, what meaning did the legislature intend when it used the words "processing" and "manufacturing"?

The Appellant adduced some evidence tending to categorize the transactions recounted here as "manufacturing". The Board holds the opinion that the word "manufacturing" used by the legislature here conveys a meaning that the manufacturing operation contemplated was designed to lead to a good for sale. The Board holds the further opinion that the provision of cancelled cheques, the provision of bank statements, the provision of payroll services including the provision of pay cheques, the provision of collated information which the bank could provide - all these things and more - for hire to customers were not goods made ready for sale to customers and thus did not fall within the meaning of the word "manufacture".

Ms. Donovan, in her post hearing memorandum, at P. 12 states that "..... the courts are finding the distinctions difficult to draw between offering a service for sale and creating a good for sale ....". On the facts of this appeal without any real difficulty, the Board categorizes the operations of the bank as recounted in the evidence heard in this appeal as the provision of services rather than goods. Services are not manufactured.

The Appellant advances the analogies of the development of exposed film for hire and the dry cleaning of soiled clothing for hire as being the equivalent of processing cheques for hire (the Appellant noted that the assessor in Halifax assessed under the quoted sub-section the equipment used in dry cleaning establishments and the equipment used in photo finishing businesses) and even if the provision of developed pictures was not the delivery of a good or the provision of dry cleaned clothes was not the delivery of a good the operation used equipment required by a designed "process" to produce the changed product for which the customer was happy to pay even though he already owned the pictures and the clothing. It is argued that since the machinery used in these processes are assessable, the machinery used in the cheque cancelling processes in question here are likewise assessable.

An easy answer would be to say that the equipment used in the photo finishing process and in the dry cleaning process ought not to be assessed and therefore the analogies advanced as being persuasive by the Appellant lack merit. The Board cannot take that easy way out since it has seen nothing to convince it that the analogous equipment is not assessed appropriately.

The issue is now narrowed further to the meaning of the word "process". "Process" includes, in a general meaning, almost any conceivable organized going-on. Any equipment designed to forward that process and forming part of an integral operational unit would be assessable property. To use an analogy of the Board's own, every typewriter in every office in Halifax would, under this use of the word "process" be assessable property. Yet even the Assessor does not make that interpretation of the word "process". At one time such property was assessed as personal property and the Legislature saw fit to repeal such assessment and to replace it with a business occupancy assessment. It is clear from this action that the legislature did not intend to give such a broad meaning to the word "process" as that attributed to it by Ms. Donovan. Had it wished to do so, the Legislature could have much more easily taxed the personal property inventory of business by reverting to its old language thus simply achieving what the advocates of the broad interpretation of "process" would have us achieve by adopting their interpretation of this seemingly simple word.

The Legislature therefore did not intend that the word "process" have the broad meaning which Ms. Donovan is so strongly advocating we adopt.

The word "process" must, however, have a meaning. The Board has not to determine its meaning for all times or in all cases but merely its meaning in the context of the Assessment Act as applied to the facts proven in this appeal. In the section itself we find words which are helpful in finding the intended meaning of process. "Machinery", "operational unit", "different lines of production", give a flavour of meaning inimical to the interpretation Ms. Donovan would have us place on "process".

Section 1(A)(2) of the Assessment Act says in part"

> "....terms used in subsection (1) have the same meaning as like terms defined by the Income Tax Act."

Many cases from the Income Tax field were cited by both counsel for the Appellant and counsel for the banks in this appeal with differing objectives in mind.

The Appellant demonstrated the difficulty the income tax judges had in distinguishing between the provision of goods and provision of services.

The Respondent banks cited income tax cases in support of their contention that the equipment in evidence was designed to form part of an operational unit to process data and not to produce any good but rather to produce a service and that "process" in the context used was, to coin a phrase, goods oriented and therefore the computer room equipment was not the type of equipment listed by Section 1(a)(vi) of the Assessment Act and therefore is not assessable property. The Board has found above that the computer room equipment is designed primarily for the purposes of providing banking services. To be assessable property the computer room equipment would have to be designed primarily for the purpose of an enterprise the objective of which was providing goods. Such characterization by the Board allows a rational application of the section in question to the problems of defining assessable property. To decide otherwise would lead to a ridiculous result which the Legislature could never have intended.

Since this decision, in effect, disposes of all the issues raised in this appeal, no adjournment to hear further evidence as to ownership or valuation of the computer room equipment is necessary and a final order dismissing the appeal will issue.

The Respondent banks will have their costs taxed in one bill of costs on a County Court scale and on a party and party basis against the Appellant. The Director shall have his costs taxed on a County Court scale on a party and party basis against the unsuccessful Appellant. The Board appoints Mr. Arthur E. Hare, Q.C. of Halifax as its appointee to tax the costs herein allowed.

DATED at Halifax Nova Scotia, this 23rd day of September, A.D., 1986.

R.H. BLOIS, Q.C.
Chairman

Elizabeth Salton
Vice-Chairman

RICHARD L. WELDON
Member

The General Mining Building Ltd. v. Director of Assessment

ASSESSMENT--COMMERCIAL--LAND AND OFFICE BUILDING--MARKET VALUE--MARKET DATA, COST OR INCOME APPROACH--INCOME APPROACH APPLIED--EFFECT OF OPTION TO PURCHASE CLAUSE IN LEASE OF RENTAL PROPERTY --ASSESSMENT ACT, SS. 38, 39(1), 100(1), 101(1)

This is an appeal by T.G.M.B.Ltd. from a decision of the Regional Assessment Appeal Court, Cape Breton Region which reduced the 1985 assessment of the Appellant's office building and land located in the Town of Glace Bay from $6,000,000 to $5,591,000.

HELD: The Board determines the 1985 assessment to be $6,318,400. Because the building is unique in Glace Bay the Board makes no award for costs.

The first ground of appeal, that the Chairman failed to properly consider the arguments put forth, does not have any validity as all appeals to the Board under the Assessment Act are by way of an inquiry de novo. The third ground of appeal relating to an estimate of the assessment given by the assessor prior to the building being constructed is also not a valid ground of appeal. The Board's duty on an appeal is to determine the market value of the property in accordance with s. 38 of the Assessment Act and the Director is not estopped before this Board from adducing evidence to indicate the true market value. The second ground of appeal and the sole issue for the Board's determination is the value for assessment purposes for the 1985 assessment year of the Appellant's land and office building. The proper approach to determining the value of the subject property is by the use of the income approach. There are no sales of comparable properties which could be used in the market data approach. The cost approach would not likely be a method of valuation adopted by a potential purchaser of an income producing property such as the subject one. It nevertheless is some indication of value and is, at $6,008,081, co-incidentally close to the assessor's opinion of value by use of the income approach. The onus lies with the Appellant to adduce evidence to establish that the decision of the Regional Court was in error and to show affirmatively what the proper assessment value should be. The appraiser put forward by the Appellant as as expert witness was accepted by the Board with the limitations based on his lack of exposure to assessment practice and appraisal work in recent years. This appraiser admitted on cross-examination that his report was of no value and would have to be redone. The Board places no reliance on his report. The Appellant has not met the onus on him. The only evidence of value is that of the assessor. The selection of a proper capitalization rate is very important in the determination of value by use of the income approach. While the Board has some reservations about the process by which the assessor determined this rate, it is the considered opinion of a person clearly qualified. In the case at hand the lease to the major tenant, Devco, has a clause giving Devco an option to purchase the property at the end of the 20 year term of the lease for a fixed price of $1,750,000. The value of the property to a potential purchaser is likely to be less because of this. By the application of s. 39(1) of the Assessment Act, the assessor is obliged not to reduce the value because the property is under lease. Therefore the Board should not make any reduction because of the option to purchase clause. The Board determines the 1985 assessment to be the amount calculated by the assessor using the income approach. The Board has insufficient information to adjust the business occupancy assessments for all tenants.

NSMB-119-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **THE GENERAL MINING BUILDING LIMITED** from the decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region, dated August 21, 1985, respecting property known as 95 Union Street in the Town of Glace Bay, Nova Scotia.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: FRANK L. ELMAN, Q.C., for the Appellant; The General Mining Building Limited,

RANDALL R. DUPLAK, LL.B., for the Director of Assessment.

DECISION

By Notice of Appeal dated September 3, 1985, received by the Board on September 6, 1985, **THE GENERAL MINING BUILDING LIMITED** (hereinafter called the Appellant) appealed the decision of the Regional Assessment Appeal Court, Cape Breton Assessment Region made August 21, 1985, which reduced the 1985 assessment of the Appellant's office building and land located at No. 95 Union Street in the Town of Glace Bay from $6,000,000 to $5,591,000.

The hearing of the appeal took place in Sydney on May 13th and 14th, 1986, having been originally scheduled for hearing for February 20, 1986, but was subsequently adjourned to May 13, 1986.

Evidence was given by the Appellant indicating service of the Notice of Appeal on the Recorder, the Town Clerk for the Town of Glace Bay and the Director of Assessment within the thirty (30) day appeal period set out in Section 100(1) of the Assessment Act. Mr. Duplak on behalf of the Director agreed that the appeal was properly before the Board. The Board, being satisfied that the Notice of Appeal was served on the persons specified in Section 100(1) and having been filed with the Board within the prescribed period of appeal and the Board having given notice of the hearing to the Minister of Municipal Affairs and to the Clerk of the Town of Glace Bay, assumed jurisdiction to hear the appeal.

The Appellant's Notice of Appeal was filed with the Board as Exhibit M-1. It sets out the following grounds of appeal:

> "(a) That the Chairman failed to properly consider the arguments put forth by the Appellant;
>
> (b) That the assessment is based upon an excessive valuation of the property;
>
> (c) That the Appellant received an estimate of the assessment prior to the building being constructed with the current assessment being 60% more than the estimate provided."

It is the opinion of the Board that the first mentioned ground of appeal does not have any validity. The Board does not have a transcript of the proceedings before the Regional Court from which it could peruse the Appellant's arguments advanced before that Court and even if such a transcript were available it would not be utilized by the Board as all appeals to the Board under the Assessment Act R.S.N.S. 1967 c. 14 as amended are by way of an inquiry de novo (Section 101(1)).

The second ground of appeal is valid as a ground of appeal and the Board is obliged to weigh the evidence adduced at the hearing before the Board to determine whether or not there has been an assessment made which is based upon an excessive valuation.

The third ground of appeal is not a valid ground of appeal even though it is proven that the Appellant did receive an estimate from the assessor of the amount of the assessment prior to the construction. The Appellant may have relied upon the estimate given by the Regional Director of Assessment, to its detriment, and this may or may not constitute "detrimental reliance" in the legal sense, but it is not a basis on which the Board may lower an assessment properly made. The Board's duty on an appeal is to determine the market value of the property in accordance with the provisions of Section 38 of the Assessment Act. The evidence is clear that the Appellant requested an estimate of the assessed value of the subject building prior to its construction and this estimate was given to the Appellant by the Regional Director of Assessment in the amount of $3,500,000. A copy of the letter signed by the Regional Director is filed as document No. 2 of Exhibit M-8. In the light of the evidence given at the hearing before the Board this figure of $3,500,000 is substantially lower than the market value of the subject property. In the Board's opinion the Director of Assessment is not estopped or, in any event is not estopped before this Board from adducing evidence to indicate what is the true market value and therefore the assessment value of the subject property.

Evidence on behalf of the Appellant was given by Donald Blaise Currie, Sidney Alexander Reeves and Michael Raymond Cote. Edward MacInnis was the only witness called by the Director.

The sole issue for the Board's determination is the value for assessment purposes for the 1985 assessment year of the Appellant's land and office building situate at 95 Union Street in the Town of Glace Bay.

Donald Blaise Currie was the first witness called by the Appellant. He is the owner of Armour Realty Ltd. a company involved in the sale and appraisal of real estate in Cape Breton. He has been involved in the sale of real estate and appraisal of real estate since 1965. He was employed as an assessor in Sydney between 1959 and 1971. In 1972 he became involved with Armour Realty Ltd. on a full time basis. Between 1982 and 1985 he "took a few years off". He has taken the three year assessment correspondence course at Dalhousie. He has given opinion evidence as to real estate valuation before the Regional Assessment Appeal Court and the County Court. He stated his opinion evidence was accepted by those courts as an expert.

Counsel for the Appellant requested the Board to accept Mr. Currie as a person qualified to give expert opinion evidence as an appraiser of real estate.

On cross-examination Mr. Currie stated that the last time he testified in court as an expert appraiser was in Truro in 1979. This hearing involved the assessment of residential property. Mr. Currie had testified before the Regional Assessment Appeal Court about 1982 or 1983 in connection with the Cape Breton Turf Club of which he was the owner at the time. Mr. Currie had "closed down" his real estate business in 1982 and he had not been active in the real estate business or in appraisal work since 1979. During the past seven years he had not taken any refresher courses and had not read any assessment cases. Counsel for the Director objected to the Board accepting Mr. Currie as an expert witness especially on assessment matters.

On questioning by the Board Mr. Currie stated that 1971 was the last year he had been employed as an assessor. He had carried out an appraisal of a residential property in connection with a mortgage application a week before the hearing. Mr. Currie has no financial interest in the subject property.

The Board after noting Mr. Duplak's objection about Mr. Currie's qualifications accepted Mr. Currie as a witness qualified to give opinion evidence as to real estate valuation based on the witness's previous experience as an assessor and as a realtor. The Board noted that Mr. Currie's inactivity in the appraisal field in recent years would be taken into account in weighing his evidence.

Mr. Currie prepared an appraisal report for purposes of the hearing before the Board. This report was filed as Exhibit M-6. In a letter dated February 10, 1986, attached to the report and addressed to the Appellant's solicitor it states that "It is our opinion that the market value of the subject property for assessment purposes as of January, 1983, is $4,500,000". On direct examination Mr. Currie stated that his appraisal is based on market conditions as they existed in January of 1983. He was asked "What does this do to your appraisal then?" With respect to the 1985 assessment year he said it would change it substantially because the cap rate is going to have to be adjusted by probably 6 or 7% to be in line with 1985 interest rates. He stated that he "found it a very difficult task to complete this appraisal". He said he cannot say that his appraisal is in line with 1985 costs. His figures are based on 1983 costs.

Counsel for the Appellant asked Mr. Currie to look at an appraisal report prepared by Edward MacInnis, the assessor, which had been filed as Exhibit M-5 and proceeded to ask him what was the effective date on the MacInnis report. He replied January 1, 1983. At this point Counsel for the Director objected to questions being directed to the witness concerning the assessor's appraisal report on the basis that the reference to the effective date of the report was incorrect and should have read January 1, 1985. Counsel for the Director stated he had intended to raise this point at a later time in the hearing when he intended to formally tender the report as an Exhibit. The Board ruled that the report had been filed and that Counsel for the Director could later call Mr. MacInnis, the author of the report who could then make whatever corrections he wished.

Counsel for the Appellant then requested a recess which was granted.

Mr. Currie said that 1983 was the base year for assessment purposes for the three year period covering 1983, 1984 and 1985. He stated that ordinarily the assessment would remain the same for the two years following the base year as re-assessment takes place every three years.

He described the subject building as a five-storey office building built in 1983 and located on an irregular shaped lot of land on the south side of Union Street 50' east of Fletcher Street and lying between Union Street on the North and Marconi Street on the south. His report stated that the area of the building is 87,152 square feet plus a basement of 17,524 square feet. The foundation is poured concrete, the walls are pre-engineered metal sandwich panels and glass and the frame is steel. He described the basement as used mostly for mechanical purposes and storage except for a small cafeteria area.

The ground floor has an entrance lobby with meeting rooms off the lobby. There is a unrented vacant area of 5,830 square feet on this floor.

Mr. Currie's report states that "no official zoning is in place" for the subject property. His report states that the present use of the building, that is, as an office building, is the use for which it was constructed and may be described as its highest and best use.

Mr. Currie, using the cost approach method of valuation arrived at an estimate of value of $4,224,000 for the subject property. The following are his calculations for his cost approach valuation as shown in his report:

"COST APPROACH

Area Per Floor

Floor	(1)	17.056	Basement: 17.524 square feet
	(2)	17.524	
	(3)	17.524	
	(4)	17.524	
	(5)	17.524	
		87.152 square feet	

Ratio: Perimeter $\frac{87,152}{2,725} = 31.98$

Basement $\frac{17,524}{544} = 32.25$

87,152 sq. ft. @ $40.82 =	$3,557,544.
Basement 17,524 sq. ft. @ $16.93 =	$ 296,680.
	$3,854,224.
Time - Location (Feb./83)	x $1.37
	$5,280,287.
MINUS Depreciation (10%)	528,029.
	$4,752,258.
MINUS Vacancy Factor	318,401.
1st Floor: 5830 sq. ft. or 6.7%	$4,433,857.
ADD: Land Value	
Union Street 30,580 @ 2.25 sq. ft.	$ 108,100.
Marconi Street 19,650 @ 2.00 sq. ft.	
FINAL ESTIMATE OF VALUE:	$4,542,000. (rounded)
MINUS: Sales/Ass't Ratio - 93%	318,000.
	$4,224,000."

Mr. Currie arrived at a figure of $4,488,600. as the valuation of the subject property by the use of the income approach to value. The following are his calculations for his income approach valuation taken from his appraisal report:

"INCOME APPROACH

Annual Gross Income (89,654 sq. ft. x $17.50)		$1,568,972.
Vacancy factor (6.7%)		105,121.
Effective Gross Income		$1,463,851.
Expenses (Estimates)		
Taxes	$230,400.	
Insurance	4,500.	
Electricity	12,000.	
Snow Removal	2,500.	
Repairs/Maintenance	5,000.	
Office	1,000.	
Management (2.5%)	36,600.	
Legal	3,500.	
Accounting Fees	10,000.	$ 305,500.
NET INCOME		$1,158,351.

Capitalization Rate:

Interest Rate	19%	(See Lease Agreement)
Risk Rate	5%	
Cap. Rate	24%	

$$\frac{\text{Annual Net Income}}{\text{Cap. Rate}} \quad \frac{\$\ 1,158,351.}{24\%.} = \quad \$4,826,462.$$

MINUS: Sales to Assessment Ratio 93% (Assessment Office Estimate)	$ 337,852.
Indicated Value by Income Approach	$4,488,600.

Built Up Rate:

Interest Rate - see Lease Agreement 19% year #1
Recapture or Risk rate - term of lease 20/100 = 5%"

The sales approach to valuation was not used by Mr. Currie "because of the lack of sales of comparable property in the area of the subject property."

The Currie appraisal report concludes with the following comments:

> "The appraiser has given careful consideration to all aspects of the subject property affecting its 'market value'. Special attention not only to the fluctuating interest rates at the time but also the poor economy i.e.: heavy water plant (ready to close at any time), #26 mine was considered by many as a real 'time bomb' prior to the explosion which certainly indicates a higher than usual risk rate for this type of property."

Mr. Currie identified Exhibit M-7 which he had prepared which shows certain sales in the Town of Glace Bay in the years 1984 and 1985 indicating that the total sales prices for these properties is $951,200. and the assessment total for these properties is $1,201,400. The list of sales shown in Exhibit M-7 is a mix of residential and commercial properties and does not include all sales in the Town of Glace Bay and is therefore not a representative ratio of sales to assessments. He stated that the sales shown in M-7 were a selected group of sales which he had obtained from one realtor. M-7 shows that these sales were on average 26% less than the average assessment of these properties. Mr. Currie then suggested that his cost approach estimate of value shown in his report as $4,542,000. for the subject property should be reduced by 26% or $1,180,920. resulting in a figure of $3,361,080. rather than the figure of $4,224,000. shown in his report resulting from deducting $318,000. from $4,542,000. The figure of $318,000. is based on assessment sales ratio of 93% which Mr. Currie obtained from the assessment office.

Mr. Currie, when asked by Counsel for the Appellant, to identify the commercial properties in the list of 35 properties contained in M-7 was able only to identify two. These are the New Aberdeen Laundromat and the Glace Bay Bus. He thought most of the other properties were residential. He did not appear to be familiar with the properties listed in M-7.

Mr. Currie explained that he arrived at an interest rate of 19% in his calculation of the cap rate from an examination of the 20-year term lease made between the Appellant as landlord and Cape Breton Development Corporation as tenant. This lease is dated October 29, 1982 and a photocopy of the lease is filed as document No. 5 of Exhibit M-8. Clause 3.02 of that lease states that the tenant's rent is based "upon an interest rate of 19% which the parties as of the date of execution of this Lease/Option Agreement anticipate the landlord shall be liable to pay under a mortgage charging the land and building". The clause makes provision for a rent adjustment if the mortgage interest rate should vary from 19%.

Mr. Currie assumed that the economic life of the building was 20 years based on the fact that there was a 20-year lease in effect.

Mr. Currie referred to the option to purchase clause in the Lease/Option Agreement. This option is set forth in Section 7 of the Lease/Option Agreement and provides that the tenant, its successors and assigns has the sole and exclusive option irrevocable within the time limited for acceptance to purchase the landlord's fee simple in the land and building at and for the price of $1,750,000. The option is open for acceptance by the tenant or its successors in title or assigns "at any time during the fourth last calendar month of the Term...".

Mr. Currie indicated that property values generally have increased by 200-300% over the past 20 years and because of inflation were likely to continue to increase. When asked on direct examination what effect the option to purchase clause in the lease would have on the present value of the subject property responded that he couldn't say. He was of the opinion that the $17.50 a square foot rent being paid by the present tenant could not be obtained from any other potential tenant.

Mr. Currie was of the opinion that if Devco was not the tenant it would be impossible to rent the subject building at the rental being paid under the present lease agreement.

On cross-examination Mr. Currie agreed that he was wrong in his evidence given on direct testimony respecting his income approach calculations when he said he should deduct 26% from the value of $4,826,462. to adjust for the general level of assessment. He agreed that he should have added 26% of this value (26% of $4,826,462. = $1,254,880.) to arrive at an adjusted value of $6,081,342. instead of the figure of $3,671,582. previously given. Also with respect to the cost approach he had previously said he deducted 26% from the figure of $4,542,000. to arrive at an adjusted value of $3,361,000. He agreed that he should have added 26% to the figure of $4,542,000. to arrive at an adjusted value of $5,722,920.

Also on cross-examination Mr. Currie agreed that in his cost approach calculations he had not made any allowance for demolition costs or for architects fees. He agreed that his square foot cost of $40.82 which he used was incorrect as it is the figure given in Boeckh's Manual for a 7-storey building and the subject building is a 5-storey building. He said he should have used as a square foot rate a figure lying between $40.82 and $53.06. He agreed that his entire calculations should be redone. Further he agreed that his definition of value shown in his appraisal report in quotation marks was in fact a quotation from Section 38 of the Assessment Act which was not in force at the relevant time.

On cross-examination Mr. Currie was questioned as to how he obtained the $1.37 figure shown on his cost approach calculations and referred to as a time-location multiplier. He agreed that the dollar sign should not appear and he further agreed that his figure of 1.37 taken from the Boeckh Manual was incorrect. This figure, he agreed, should be 1.39 as is shown in the Boeckh Time Location Multiplier for January, 1983, a copy of which was filed as Exhibit M-11.

When questioned about the 10% allowance he made for depreciation, Mr. Currie stated he used 10% because of wear and tear and obsolescence. He was unable to state what percentage related to physical depreciation or to obsolescence.

On the cross-examination of Mr. Currie on his Income Approach he was asked why he applied a 6.7% vacancy factor to the gross income figure of $1,568,972 in calculating the "Effective Gross Income" of $1,463,851. which was obtained by multiplying the leased area of 89,653 sq. ft. by $17.50.

He was asked "why are you attributing 6.7% vacancy to the rented area?" His reply was "it's wrong". He was asked why he allowed for any vacancy factor of the rented area in light of the fact that the Boeckh Manual did not provide for a vacancy factor in the case of a triple-A tenant. Mr. Currie agreed that Devco was a triple-A tenant.

Mr. Currie agreed with the suggestion by Counsel for the Director that what he was really valuing was the lease and not the property.

Mr. Currie on cross-examination agreed that the statement in his report that there is no official zoning in place for the subject property is in error.

At the conclusion of Mr. Currie's re-examination he was asked by the Board as to what opinion of value he would have after making the various corrections and adjustments to his report which were indicated by his evidence. He stated he could not give his opinion without re-doing his calculations but did agree his figures would be different.

The next witness called by the Appellant was Sidney Alexander Reeves, a Civil Engineer, entrepreneur and President of the Appellant company. He stated that in 1982 Devco wanted to consolidate its office into one building. He said Devco wanted a building built in Glace Bay to be designed and constructed by Cape Bretoners operating a company with no more than 50 shareholders. He was encouraged to see if he could arrange for a group of investors to build the required building.

Mr. Reeves identified ten documents filed as Exhibit

M-8. Item No. 1 of M-8 is a copy of a letter sent to prospective shareholders of The General Mining Building Limited in August of 1982. The next document in M-8 is a "Fact Sheet" outlining the proposal for the development and construction of a building to be occupied as the head office of the Mining Division of the Cape Breton Development Corporation at Glace Bay. This fact sheet gave the anticipated cost of construction in the amount of $6,075,000. and indicated a mortgage of $4,325,000. at 19% amortized over 20 years would provide the major portion of the funding required.

Mr. Reeves stated that he had requested an estimate of the assessment which would be placed on the property from Charles Hopkins, the Director of Assessment. Mr. Reeves supplied Mr. Hopkins with the plans and specifications of the building. A copy of a letter dated August 17, 1982, from Mr. Hopkins to Mr. Reeves is filed as document No. 2 of Exhibit M-8. This letter reads as follows:

> "Re: Estimate of Assessment Proposed
> Office Building Union Street, Glace Bay, N.S.
>
> Dear Sandy:
> The following is the estimate on Assessment which you requested on the above property.
>
> The building is to be five (5) storeys with 17,524 square feet on four (4) floors, 17,056 square feet on the ground floor, with a partial basement containing 10,140 square feet.
>
> Construction is of Steel Frame, with Sandwich Panel of Aluminum, built up T & G roof, Concrete floors with Carpet-Tile Cover, adequate plumbing facilities, air conditioning & electric heating systems.
>
> Based on the foregoing, an Assessment of three million five hundred thousand (3,500,000)

is estimated on the real property and business occupancy of one million seven hundred & fifty thousand (1,750,000).

The Current Commercial Tax Rate in the Town of Glace Bay is $3.22, with produces a total tax of $169,050.00, $112,700.00 on Real Property and $56,350.00 on Business Occupancy.

I trust this information is of some assistance.

Yours truly,

(Sgd)
Charles Hopkins, N.S.I.A.
Director of Assessment

CH:epf"

Document No. 6 of Exhibit M-8 is a photocopy of a building permit application dated January 12, 1982 which shows an estimated value of the work in the amount of $5,000,000. This application was made by Seveer Realty Ltd. and signed by Mr. Reeves who is the President of that company. Seveer Realty Ltd. is one of the shareholders of the Appellant Company and also administers the subject property under a property management agreement with the Appellant.

Financial statements of the Appellant Company as of October 31st for the years 1983, 1984 and 1985 are included in Exhibit M-8. The financial statements for the year ending October 31, 1984, are filed as document No. 8 of Exhibit M-8. Page 5 of document No. 8 is entitled "Note to Financial Statements" and note 2 states the cost of land to be $216,158 and the cost of building to be $5,811,970.

According to Mr. Reeves the estimate of assessment given by Mr. Hopkins was used as a basis for "our pitch to investors". He pointed out that prospective shareholders were given a copy of a financial statement entitled "Projected Statement of Income and Retained Earnings" for "Year One of Operation" which showed various expense items including Municipal Taxes of $115,000. A copy of this statement is filed as document No. 3 of Exhibit M-8.

Mr. Reeves indicated that if the real property taxes were $230,000. rather than the estimated $115,000., the company would not have been able to service its preferred shares and he concluded that "I doubt if we would have been able to sell our preferred shares and the deal might have collapsed".

He stated that the lease with Devco dated October 29, 1982 (document No. 5 of Exhibit M-8) was in place prior to the construction of the building and prior to the financing being arranged.

Mr. Reeves explained that the option to purchase clause in the lease agreement (clause 7) meant that the tenant (Devco) was paying for the building as part of the rent over the 20 year term of the lease. He stated that the tenant was actually starting to pay for the building with the first month's rent. He was of the opinion that the value of the building at the end of the 20 year lease term would be very much in excess of the $1,750,000. purchase price set out in the option to purchase clause of the lease. He said it has been his experience as a developer in Cape Breton that building values generally increase if the building is properly maintained. He said that the rental charge was higher than normal because of the purchase element in the rental amount.

Mr. Reeves stated that the equity financing for the building was to be provided from the sale of 35 units of $50,000. each for a total of $1,750,000. Each unit included 5 preference shares plus one common share. Only 29 units were sold and Devco invested $300,000. equal to the value of 6 units. Devco therefore had an equity position in the Appellant company of 6/35.

Mr. Reeves stated that the $6,000,000. assessment made for 1985 was called into question by the shareholders of the appellant Company. This assessment equated to a 1985 tax of $230,400. based on a tax rate of $3.84 per $100 of assessment.

On cross-examination Mr. Reeves said he had not given Mr. Hopkins, the Regional Director of Assessment, any figures concerning the estimated cost of constructing the subject building although the material sent to prospective shareholders in the Appellant company stated the anticipated cost of construction to be $6,075,000. (See Fact Sheet on page 2 of Exhibit M-8). Mr. Reeves said this Fact Sheet had been prepared some weeks prior to August 6, 1982 when it was mailed to prospective investors. A copy of the Fact Sheet was not given to Mr. Hopkins. Neither was the fact that the building permit application showed an estimated cost of $5,000,000. given to Mr. Hopkins. Mr. Reeves said he was not asked by Mr. Hopkins for additional information about the building and he didn't volunteer any. Mr. Reeves considered Mr. Hopkins the highest authority in the area on assessment matters and could have requested further information if he thought it was required. Furthermore, Mr.

Reeves, although he knew that mortgage financing of $4,325,000. had been arranged for the project and his own information indicated a cost of construction of $6,075,000. did not question Mr. Hopkins figure of $3,500,000. According to Mr. Reeves the actual "hard costs" of the bulding amounted to approximately $5,000,000. and the total cost including "soft costs" amounted to approximately $6,000,000.

The third witness to testify on behalf of the Appellant was Michael Andre Cote, a Chartered Accountant employed with Doane Raymond since 1978. He has been working in the Sydney office of Doane Raymond since 1981. He stated he had estimated the value of the subject property from an accountant's point of view. He was not personally involved with the Appellant's file which was maintained in his firm but he had reviewed the file. He made some calculations of value by considering the minimium lease payments the landlord will receive over the 20 year period of the lease, less the cost of maintaining the property by the lessor discounted by the rate of return in the lease. He identified Exhibit M-12, a one page financial statement which he personally had prepared. This statement is entitled "Schedule of Relative Facts - Re Property Tax Assessment" and relates to the subject property. Exhibit M-12 reads as follows:

THE GENERAL MINING BUILDING

SCHEDULE OF RELATIVE FACTS - RE PROPERTY TAX ASSESSMENT

1. Expenses - Year Ended October 31, 1985

Administration	$	24,800
Heat, light and power		12,375

	Insurance	3,337
	Maintenance	3,791
	Office	660
	Professional fees	11,700
	Property taxes (Actual $213,149)	125,000
	Income taxes	150,987
		$ 332,650
2.	Rate of inflation on average	6%
3.	In 20 years ($332,650 x 3.207)	$ 1,066,809
4.	Simple average ($1,066,809 + $332,650/2)	$ 700,000 (Rounded)
5.	Therefore: Annual rental	$ 1,568,972
	Less: Operating expenses (above)	(700,000)
	Annual cash available for mortgage	$868,972

Conclusion: With an expected rate of return on investment of 20% (ie. anticipated in original projections), the above annual cash available for mortgage will maintain a mortgage of $4,308,114."

From the calculation he made in Exhibit M-12 of $868,972 as the amount of money available for mortgage payments, Mr. Cote prepared a statement of discounted cash flow filed as Exhibit M-13 which reads as follows:

THE GENERAL MINING BUILDING

SCHEDULE OF DISCOUNTED CASH FLOW

(Unaudited)

Year	Net Yearly Payment Received	Rate of Return @ 20%	Discounted Value @ 20%
1	$ 868,972	.833	$ 723,854
2	868,972	.694	603,067
3	868,972	.579	503,135
4	868,972	.482	418,845
5	868,972	.402	349,326
6	868,972	.335	291,106
7	868,972	.279	242,444
8	868,972	.233	202,470
9	868,972	.194	168,581

10	868,972	.162	140,772
11	868,972	.135	117,311
12	868,972	.112	97,325
13	868,972	.093	80,814
14	868,972	.078	67,780
15	868,972	.065	56,483
16	868,972	.054	46,925
17	868,972	.045	39,104
18	[878,972] sic	.038	33,021
19	868,972	.031	26,938
20	868,972	.026	22,593
	17,379,440		4,231,894
Final Payment	1,750,000	.026	45,500
	$19,129,440		$4,277,394

Therefore: At a rate of return of 20% on investment, the present value of the cash flows in year 1 is $4,277,394."

Lastly, Mr. Cote prepared a statement filed as Exhibit M-14 which indicates that the present value in Year 1 of an investment of $3,056,309 with a return of 15% on investment would yield $19,129,440 representing 20 times the net yearly payment of $868,972 plus the final payment of $1,750,000 being the option purchase figure referred to in the Devco lease. Exhibit M-14 reads as follows:

"THE GENERAL MINING BUILDING

SCHEDULE OF ESTIMATED VALUE OF RENTAL BUILDING

(Unaudited)

Gross rental revenue/year	$ 1,568,972
Average operating expenses including taxes at a rate of inflation of 6%	(700,000)
	868,972
Years	20
	17,379,440
Add: Purchase option (20th year)	1,750,000
	$19,129,440

Present value of investment in year 1 at 15%

Investment	$ 3,056.309
Annuity factor @ 15%	6.259
	$19,129,440

Therefore; At a 15% return on investment
$3,056,309 would be invested
in year 1 to yield $19,129,440."

On cross-examination, Mr. Cote stated that his figures did not purport to represent the assessed value of the subject property. "From the point of view of capitalizing a lease, this is the value we would reflect on it". On questioning by the Board, Mr. Cote said he was evaluating the landlord's interest in the Devco lease.

The last witness was Gerald Edward MacInnis an assessor who testified on behalf of the Director. He has been employed as an assessor since 1975 and is responsible for approximately 4500 assessments including 800-900 commercial assessments. He has taken the three year course on Assessment Practices given by the Dalhousie Institute of Public Affairs and has attended nine schools for assessors given by the Department of Municipal Affairs. He has taken the following courses through the Appraisal Institute of Canada, (a) Appraisal 101, 201, 301; (b) Economics 100; (c) Land Law I and (d) Basic Accounting. He is presently classified as a Senior Assessor with the Department of Municipal Affairs. The Board accepted Mr. MacInnis as an expert witness qualified to give opinion evidence relating to valuation of property for assessment purposes.

Mr. MacInnis identified Exhibit M-5 as an appraisal report relating to the subject property which he had prepared. He had been supplied by the owner with certain factual information contained in the report after having made a formal request for the information.

Mr. MacInnis' report (Exhibit M-5) states that the effective date of his valuation of $6,318,400 for the subject property was January 1, 1983 but on direct examination he corrected this to read January 1, 1985. He arrived at this figure by means of the income approach. He stated that the subject land was partly zoned C-2 and partly zoned R-3. The majority of the building is located on lands zoned C-2. He said he carried out a site inspection of the property and viewed the building both inside and outside. Because the property was an income producing property he employed the income approach to valuation on the basis that the most likely purchaser would be an investor interested in the property's ability to generate and maintain an income stream. Mr. MacInnis ruled out the Direct Sales Comparison Approach method of valuation as "no sales of comparable properties exist". He also rejected the Cost Approach based on his opinion that this approach would not "be a method that a potential purchaser of this type of property would use in estimating its market value".

Mr. MacInnis' report makes the following pertinent comments regarding the Income Approach, viz:

> "The Income Approach to value is based upon the theory that present value is the present worth of the future benefits that a property may reasonably be expected to produce during its remaining economic life.

The usual steps involved in developing a value estimate by this approach are:

1. Estimate the total annual gross income of the property, less allowances for future vacancies and bad debts.
2. Estimate the total annual operating expenses.
3. Calculate the annual net operating income (gross income less expenses).
4. Select an appropriate capitalization rate.
5. Using a suitable procedure, convert the anticipated annual net operating income into an indication of the capital value of the property."

Although he didn't employ the cost approach, Mr. MacInnis at Page 11 of his report sets forth some "Indications of Development Cost" as follows:

I	Land Cost	$ 167,117
	Demolition Cost	35,000
	Building Permit Value	5,000,000
TOTAL		$5,202,117
II	Department of Development	
	Nova Scotia Construction Activity Report	$5,500.00
III	Audited Statement	$6,063,830
	General Mining Building Ltd. October 31, 1984	

The following contain the full text of pages 12-16 of the MacInnis report which sets forth the calculations and methodology used in his determination of a market value of $6,318,400 for the subject property based on the Income Approach.

INCOME APPROACH

Gross Income Estimate

C.B.D.C. Premises	89,653	sq. ft. @	$14.32	=	$1,283,831
Dept. of Health	538	sq. ft. @	11.38	=	6,120
Vacant (Restaurant)	630	sq. ft. @	11.43	=	7,200
Vacant (Basement)	6,273	sq. ft. @	11.00	=	69,003
Vacant (Main Floor)	5,330	sq. ft. @	15.00	=	79,950
TOTALS	102,424	sq. ft.			$1,446,104

Percent Vacant

Rent (Vac.) $156,153 ÷ $1,446,104 = 10.8 %

VALUE CALCULATION BY INCOME APPROACH

1) Total Potential Income			$1,446,104
2) Vacancy and Bad Debt (10%)		$144,610	
Effective Gross			1,301,494
3) Expenses:			
Electricity	$12,375		
Repairs & Maintenance	2,929		
Insurance	3,337		
Snow Removal	862		
Legal & Audit	11,700		
Office	660		
Administration	24,000		
TOTAL (4.3)		55,863	
Potential Net			1,245,631
4) Cap. Rate			17.58%
Base: 14%			
5) Effective Tax Rate: 3.58%			
Indicated Value ~~October~~ January 1985			7,085,500
6) Less: Basement u/c 6,273 @$27.47			(172,319)
Main Floor u/c 5,330 @$26.18			(139,539)
Indicated Value ~~10~~ 01/85			$6,773,640
General Level (93.3%)			x93.3%
Uniform Assessment			6,319,806
7) Plus Department Health (2,092 x .8688)			1,817
Indicated Assessment with Parking			6,321,623
8) Less 24 Marconi Street Assessment			3,200
Indicated Assessment			6,318,423
Indicated Assessment Rounded			$6,318,400

NOTES ON INCOME APPROACH

1) Gross Income	Taken from owners operating statement to October 31, 1985 with economic rents placed upon vacant areas.
2) Vacancy Rate	A vacancy rate of 10% was used after considering the rental history of the property.
3) Expenses	As reported on owners operating statement as of October 31, 1985 excepting A) Administration -$24,000 as shown on Audited Financial Statements to October 31, 1984 B) Property taxes have been omitted from the operating expenses since they are included in the capitalization rate.
4) Base Capitalization Rate	14% In researching capitalization rates in the industrial Cape Breton area, no sales of comparable properties were found to obtain a capitalization rate. Conversations with local real estate appraisers and a major developer indicated capitalization rates for the industrial Cape Breton area ranging between 12.5% and 13.5% for this type of investment property. Considering the economic condition of the Town of Glace Bay a capitalization rate of 14% was felt appropriate.
5) Effective Tax Rate	The effective tax rate is used to account for property taxes as an operating expense when calculating value for assessment purposes. The method calculates typical property taxes regardless of former assessments. The method involves applying the commercial general level to the commercial tax rate and adding this percentage to the base capitalization rate. 1984 tax rate X 1984 level of assessment. $3.84 x 93.3% = 3.58%

NOTES ON INCOME APPROACH (CON't)

6) Construction Allowance

The subject property has sections of the basement and ground floor which are incomplete. A deduction based upon the cost to complete these areas has been calculated using, the Boeckh's Valuation Manual. The costing is as follows:

A) Basement Finish Cost B.V.M.

4" R/C Slab	$1.24
Floor Finish	1.83
Ceiling Finish	2.03
Partitions @30 sq.Ft./L.ft.	$1.05
H.V.A.C.	6.15
Electrical	4.76
	17.06
Time to 10/85	1.61
Cost 10/85	$27.47

B) Main Floor Finish Cost B.V.M.

Floor Finish	$1.83
Ceiling Finish	2.03
Partitions @17 sq.ft/L.ft. =	1.49
Electrical	4.76
H.V.A.C.	6.15
	16.26
Time 10/85	1.61
Cost 10/85	$26.18

7) Department of Health

Leasehold improvement for the Dept. of Health space were indicated to be $2,092. This amount was factored to the base date using construction cost indexes.

8) 24 Marconi Street

This parcel of land is used for parking as part of the subject complex, it has been assessed separately for 1985 for $3,200. This amount has been subtracted from the Income Approach to reflect this fact.

CONCLUSION OF VALUE

It is the opinion of the assessor, after considering all factors, that the market value of the subject property for assessment as of January 1, 198~~4~~5 is six million three hundred eighteen thousand four hundred dollars ($6,318,400).

Mr. MacInnis stated that the purpose of his report was to estimate the market value of 95 Union Street in the Town of Glace Bay, as of January 1, 1985, according to the Assessment Act, Section 38.

Mr. MacInnis identified Exhibit M-15 as a letter dated July 4, 1985, from Charles Hopkins, the Regional Director of Assessment to Hugh Morrison the Assistant Director of Assessment for the Province of Nova Scotia. This letter sets forth a summary of sales to assessment ratios for the municipal units in the Cape Breton Assessment Region based on the 1984 market. It indicates that the level of assessment for the Town of Glace Bay was 93.3% based on 186 sales. He stated that only "arms length" sales were considered.

On page 12 of his report Mr. MacInnis shows his calculations of the gross income of the building. When asked how he arrived at $14.32 as the rent per sq. ft. for the space occupied by the Cape Breton Development Corporation he explained that he obtained the gross rental income for the 1985 year ending on October 31, 1985, from the Appellant's financial statements in the amount of $1,290,157, 99.7% of which (according to Note 10 on page 5B of the 1985 financial statements) constituted rental income from C.B.D.C. He then divided this income by 89,653 sq. ft. being the space occupied by C.B.D.C. The arithmetic would appear to be as follows:

Total Rental Income for 1985	$1,290,157
Per Centage of total rental income attributable to C.B.D.C.	99.7%

C.B.D.C. rent paid to Appellant
    99.7% of $1,290,157 $1,286,286

C.B.D.C. rental per sq. ft $\frac{1,286,286}{89,653}$ = $14.34

Mr. MacInnis applied "economic rents" to the vacant space in the subject building in arriving at $1,446,104 as the "Total Potential Income" from the building.

Mr. MacInnis explained in detail how he calculated the value of the subject property by the use of the Income Approach. From the total potential income of the property of $1,446,104 he deducted 10% for vacancy and bad debts amounting to $144,610 to obtain an effective gross income of $1,301,494. From this figure he deducted expenses of $55,863 most of which he obtained from the Appellant. This gave a potential net income figure of $1,245,631 to which he applied a capitalization rate of 17.58% made up of a base capitalization rate of 14% plus the "effective tax rate" of 3.58%. This resulted in a value of $7,085,500 from which he deducted his estimates of the cost of completing unfinished portions of the main floor and basement in the sum of $311,858. This produced an indicated value as of January 1985 of $6,773,640. He next applied the general level of assessment of 93.3% to obtain the sum of $6,319,806 which he described as a "uniform assessment". Finally, he added the cost of leasehold improvements in the space occupied by the Department of Health amounting to $1,817 to obtain an "Indicated assessment with Parking" which resulted in an "Indicated Assessment Rounded" of $6,318,400 which he determined is the market value of the subject property for assessment as of January

1, 1985".

On questioning by the Board Mr. MacInnis stated that he had employed the use of the general level of assessment of all properties in his income approach calculations because he considered that the record of only four commercial sales in the Town in 1984 were not representative of overall commercial values. The four commercial sales shown in Exhibit M-16 indicate the total assessments of these properties for 1984 exceeded the total sales of these properties by 3.7%.

On cross-examination Mr. MacInnis identified Exhibit M-23 as the notes prepared by David Cote, the assessor, in connection with Mr. Cote's original assessment figure of $6,000,000. These notes showed a building value of $5,114,691 and a land value of $121,665 for a final cost value of $5,236,400 (rounded). No explanation appeared on these notes to show how Mr. Cote arrived at the 1985 assessment figure of $6,000,000.

On cross-examination, Mr. MacInnis stated that the only other commercial property in Glace Bay he had assessed was the Sterling Mall which he had assessed along with Mr. Cote. Mr. Cote had assessed the other commercial properties in Glace Bay. Mr. MacInnis did not appear to be very familiar with Glace Bay as he was not aware of how many unoccupied stores there were in the Town or how much vacant office space exists in the Town. He stated that if the subject building was situate in the City of Sydney he would have used a lower capitalization rate, probably 12% rather than the base capitalization rate of 14% used for the subject property. He acknowledged that the subject property was unique in the Town of Glace Bay and no other building in the Town enjoyed rents as high as those in effect for the subject building.

Post hearing briefs were filed by Counsel for the Appellant and Counsel for the Director.

Counsel for the Appellant argues that the Appellant was misled by the Regional Director of Assessment in providing the Appellant with an estimate of the assessment for the subject property in the amount of $3,500,000 prior to the building's construction which estimate was relied upon by Mr. Sidney Reeves in his endeavours to arrange equity financing for the proposed office building. The Appellant relies on the law as enunciated in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. 1964, A.C. 465 (House of Lords) where at pages 502-503 it states:

> "My Lords, I consider that it follows that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

Counsel for the Appellant cites several cases in his brief which follow the law set out in the Hedley Bryne case including Cari-Van Hotel Limited v. Globe Estates Limited (1974) 6 W.W.R. 707 in which Ruttan J. of the British Columbia Supreme Court states at page 714:

> "Nowadays since Hedley Bryne it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty...the essence of this proposition, however, is the reliance...the professional man must know that the other is relying on his skill and the other must in fact rely on it."

The Appellant submits that:

> "In the present case there is no question that the promoters of the project relied upon the expertise of the Director of Assessment in providing them with an estimate of the real property assessment that would be placed upon the property once constructed, and relying upon that information embarked upon one of the largest realty projects in the area."

From the evidence adduced it is clear that Mr. Reeves did in fact rely on the estimate given by the Regional Director of Assessment. It is puzzling however that Mr. Reeves, being an experienced businessman and developer did not question Mr. Hopkins, the Regional Director, as to the amount of his estimate in light of the clear knowledge of Mr. Reeves that the building cost and land would likely be in the $6,000,000 range. Furthermore, Mr. Hopkins gave only an "estimate" and this "estimate" was not in the nature of an assessment. In any case if the law set forth in Hedley Byrne and other cases applies to the facts of this case it means that the Appellant or Mr. Reeves has a right to claim damages from Mr. Hopkins. In no way does this possible right affect the issue before the Board, namely to determine the proper value of the subject property for assessment purposes for the 1985 assessment year. What someone estimated the assessment to be prior to actual construction is evidence to be given consideration by the Board but is in no way conclusive. It is open to speculation what estimate might have been given by Mr. Hopkins had he possessed all of the relevant information in the hands of Mr. Reeves at the time of the request for the estimate. Mr. Reeves knew that a mortgage loan of $4,325,000 was available and that the cost of the building plus land costs would approximate $6,000,000 as will be seen from page 2 of the projected financial statements of the Appellant company prepared in July of 1982 (see Document No. 4 of Exhibit M-8).

Counsel for the Appellant in his alternative argument set out in his post hearing brief deals with the issue at hand, that is, the valuation of the subject property in accordance with Section 38 of the Assessment Act. Counsel for the Appellant again refers to Mr. Hopkins' estimate of assessment in the amount of $3,500,000 and of the notes of the assessor Daniel Cote (Exhibit M-23) indicating a final value for land and building of $5,236,400 with an assessment of $6,000,000 and also Mr. MacInnis' opinion that the assessment should be $6,318,400. Finally he refers to the three opinions of value given by the accountant Andre Cote which ranged from $3,560,000 to $4,300,000.

Counsel for the Appellant submits that the subject building "is like no other commercial rental income property in the area". This submission seems to fit the facts as all witnesses appeared to agree that the subject building was unique, having resulted from the prime tenant (Devco) seeking to have the building constructed and unique because of the equity position taken by Devco and last because of the option to purchase clause in the Devco lease giving Devco the right to purchase the building at the end of the 20 year lease term for the fixed price of $1,750,000.

Counsel for the Appellant stated that:

> "The failure of Mr. MacInnis to consider the unique rental purchase arrangements and equity position of the prime tenant in the property has led to a cap rate that is sepeculative and open to question."

In conclusion Counsel for the Appellant submits that:

> "a CAP rate of 20.58 be substituted for the rate of 17.58 as used by Mr. MacInnis in his approach. This rate would produce valuation of 5.3 million dollars. It is ironic, that this a valuation is the same amount that was arrived at by Mr. Cote in his original assessment of the property."

In the post hearing brief filed on behalf of the Director, Counsel submits that the evidence of Mr. Blaise Currie should not be accepted by the Board as that of an expert appraiser but if the Board does accept Mr. Currie as an expert witness "little or no weight should be given to his evidence". The Board has accepted Mr. Currie as an expert witness but with limitations based on his lack of exposure to assessment practice and appraisal work in recent years. Counsel for the Director submits that in cross-examination Mr. Currie "admitted his report was of no value and for it to have any relevance to the property in question it would have to be redone". The Board agrees with this submission and places no reliance on Mr. Currie's report.

Counsel for the Director submits that the only evidence of value before the Board is the value shown in the appraisal report prepared by the assessor, Mr. MacInnis, and filed as Exhibit M-5. Counsel for the Director submits that:

> "The only area of Mr. MacInnis's report that was seriously questioned was in relation to his use of a base cap. rate of fourteen percent (14%). Mr. MacInnis gave substantial evidence as to how he arrived at a base rate of fourteen percent (14%). The Appellant, although disagreeing with the base cap. rate of fourteen percent (14%) presented no evidence to the Board of another cap. rate which the Appellant felt would be the proper rate; thus, although the Appellant may not agree with the fourteen percent (14%) cap. rate used by Mr. MacInnis, there is no other evidence of a cap. rate before the Board."

Counsel for the Director makes a valid observation concerning the cap rate. Mr. MacInnis arrived at a "base" cap rate of 14% not based on actual sales of comparable properties in Glace Bay but based on discussions the witness had with developers and realtors. The 14% rate employed by Mr. MacInnis is subjective and reflects the expert opinion of Mr. MacInnis.

The selection of a proper cap. rate is obviously very important in the determination of value by use of the income approach. Since the selection of a cap rate which is too low will result in a valuation too high and vice versa it is obviously that a cap rate should be selected with great care.

The Board is of the opinion that the proper approach to determining the value of the subject property is by the use of the income approach. The evidence shows that there are no sales of comparable properties which could be used to determine the value of the subject property by means of the market data approach. The Board agrees with the opinion of Mr. MacInnis, the assessor, that the cost approach would not likely be a method of valuation adopted by a potential purchaser of the subject property which is an income producing type of property. It seems clear from the October 31, 1984 Financial Statement of the Appellant that cost of land was $216,158 and the cost of the building was $5,811,970 for a total of $6,028,128. After deducting accumulated depreciation of $20,047 the net book value of land and building was shown on the Financial Statement as $6,008,081. Although the cost of the subject building and land does not necessarily reflect its market value or assessment value it is nevertheless some indication of value and is co-incidentally close to the assessor's opinion of value by the use of the income approach.

While the Board for the reason previously stated has not relied on the appraisal report prepared by Mr. Currie, it is noteworthy that his calculation of the net income of the subject property of $1,158,351 shown in his report is only $87,280 less than the potential net income calculated by Mr. MacInnis of $1,245,631. If the cap rate of 17.58% used by Mr. MacInnis were applied to Mr. Currie's net income figure of $1,158,351 the resulting value would be $6,589,027 and by applying the 93% general level of assessment to this figure the assessment would be $6,127,795.00.

The Regional Assessment Appeal Court determined the assessment of the subject property for the year 1985 in the amount of $5,591,000 and the onus lies with the Appellant to adduce evidence before the Board to establish that the decision of the Regional Court was in error and to affirmatively show what the proper assessment value should be.

Counsel for the Director submits that the Appellant has not met this onus and that the "only evidence of value before the Board is that value as shown on the appraisal report of the assessor" filed as Exhibit M-5.

The Board agrees with the submission of Counsel for the Director and while the Board has some reservations about the process by which Mr. MacInnis determined the overall cap. rate of 17.58% used in his valuation by the income approach it is the considered opinion of a person clearly qualified as an assessor with over ten years experience in the assessment field. Mr. MacInnis determined his "base" cap. rate of 14% after making inquiries of developers and realtors in the Cape Breton area and then applying his judgment to the results obtained from these inquiries. He was candid in admitting that his determination was subjective but this is all he could do in the circumstances as he did not have any actual sales of similar properties from which he could determine a cap. rate.

The effect of the lease and the option clause in it in relation to establishing value is a matter of some difficulty. If the subject lease did not have the option to purchase clause in it which enables the tenant, Devco, to purchase the subject property for the sum of $1,750,000 at the end of the 20 year term of the lease, the methodology used by Mr. MacInnis in establishing value by the use of the income approach would clearly be appropriate in the circumstances. Once the net income is properly ascertained and the appropriate cap rate applied, the value of the property is ascertained.

In the case at hand the lease does in fact have the option to purchase clause enabling the tenant to purchase the property at the end of the 20 year term of the lease for a fixed price. The question which arises is, what effect, if any, does the option to purchase clause have on the value of the property for the 1985 assessment year. A prudent potential purchaser would have to consider the effect of the option to purchase clause in his calculation of the value of the property as of the date of purchase. It seems reasonable to assume that the value of the subject property to a potential purchaser is likely to be less than it otherwise would be because of the option to purchase clause. The purchaser would be bound by the terms of the lease and the owner would legally be obliged to sell to the tenant at the end of the lease by virtue of the option to purchase clause in the lease. The difficult question is to determine at any given date what the effect on the value of the subject property is as the result of the option clause. It seems logical that the present value or value at any given year of the lease is likely to be less than it would be if the option clause did not exist. It is, of course possible that at the time the option clause is exercisable, the property may have a market value either greater or smaller than the option purchase price.

In the valuation of property for assessment purposes the assessor must apply the provisions of Section 39 s.s.(1) of the Assessment Act which states that:

> "Property Subject to Charge
>
> 39(1) Except as provided in this Act, property shall be valued by the assessor as if the person assessed were the owner of the title in fee simple and no reduction in value shall be made merely because the property is subject to any lien, mortgage, lease, claim, license or other encumbrance on the title."

By the application of this provision in the Assessment Act, the assessor is obliged not to reduce the value of the subject property because the property is under lease. Thus, in the case at hand, the assessor and therefore the Board, should not make any reduction in the assessment value because of the lease which contains the option to purchase clause.

In the result the Board determines the 1985 assessment of the subject building and land located at No. 95 Union Street to be in the amount of $6,318,400 being the amount calculated by the assessor, Mr. MacInnis using the income approach to value. The Board is of the opinion that the evidence as to value given by Mr. MacInnis is the best evidence available. The Board places no reliance upon the evidence given by Mr. Currie because of the many errors set out in his appraisal report which have been outlined in this decision. Mr. Currie by his own admission would have to reconsider his opinion of value of the subject property. The evidence of value given by Mr. Cote, the Appellant's witness is not helpful to the Board in establishing the value of the subject property. Mr. Cote was clear in his evidence that his valuation figures were not intended as valuations of the property in question but were rather given, as an accountant's valuation of the Appellant's interest in the lease made between the Appellant as lessor and Devco as lessee.

Because the building in question is unique in the Town of Glace Bay and obviously would not have been constructed had not the major tenant which is a part owner of the Appellant corporation, been prepared to enter into the lease in question, the Board makes no award for costs.

Counsel for the Director has requested that the Board "in setting the value of the property also adjust the business occupancy assessment for all tenants". It is the Board's opinion that it does not have sufficient information to carry out this adjustment. If the Director and the tenants are unable to agree on the business occupation assessments, the Board is prepared to reconvene the hearing for the sole purpose of determining the business occupancy assessments.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 25th day of September, A.D., 1986.

R.H. BLOIS, Q.C.,
CHAIRMAN.

NOVA SCOTIA MUNICIPAL BOARD

Director of Assessment v. Gulf Canada Ltd.

ASSESSMENT--COMMERCIAL--PUMPS, TANKS, ETC.--OWNERSHIP AND EXEMPTION--JURISDICTION OF BOARD--WHETHER AGREEMENT OF FACTS USED BEFORE REGIONAL ASSESSMENT APPEAL COURT ADMISSIBLE WITHOUT CONSENT BEFORE BOARD--ASSESSMENT ACT, SS. 3(1)(a),(D), 40B(1), 77, 100(3), 101, 108(1)--MUNICIPAL BOARD ACT, S. 22(2)--SYDNEY STEEL CORPORATION ACT, S. 30(1)

This is an appeal by the Director of Assessment from a decision of the Regional Assessment Appeal Court, Cape Breton Region which disallowed the assessment to Gulf of $500,000 in respect of certain property referred to as "pumps, tanks, etc." located on land in the City of Sydney owned by the Sydney Steel Corporation. The Director objected to the jurisdiction of the Board because the appeal involved questions of ownership and exemption. This portion of the appeal deals only with the jurisdiction of the Board.

HELD: The Board dismisses the appeal for lack of jurisdiction and awards costs to Gulf to be taxed on a party and party basis on the County Court scale.

The facts of this case are unusual in that the Director has seen fit to file an appeal and then comes before the Board to question its jurisdiction to hear the appeal which he has initiated. The Director could have simply withdrawn the appeal but this obvious option was not followed. Gulf supports the Director's contention that the Board is without jurisdiction. The Board does have power to render a decision dealing with the jurisdictional questions. It is the Board's duty in every case to determine whether it has or has not jurisdiction. The Director seeks a determination of two questions, namely: (1) who is the owner of the subject property; and (2) is Gulf entitled to an exemption from taxation. The Board does not have jurisdiction to determine ownership of property. The Board agrees that a question of exemption from taxation is outside the jurisdiction of the Regional Assessment Appeal Court to determine but is a question relating to assessment which may be submitted to the Supreme Court or the County Court. The Board therefore lacks jurisdiction to hear this appeal. Gulf tendered over the objection of the Director the "Agreement of Facts" which Gulf and the Director had entered into and which had been submitted to the Regional Assessment Appeal Court. It is unnecessary to make a determination on the admissibility of this agreement in light of the Board's opinion that it lacks jurisdiction. However, the Board has serious reservations about the admissibility and evidentiary employment of this agreement without the consent of the parties in a hearing before the Board, which is in the nature of a hearing de novo.

NSMB-120-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, c. 14, as amended;

- and -

IN THE MATTER OF: An Appeal by the **DIRECTOR OF ASSESSMENT** from the decision of the Regional Assessment Appeal Court Cape Breton Region dated June 12, 1985, which disallowed the assessment of certain "pumps, tanks, etc." in the amount of $500,000 to **GULF CANADA LIMITED.**

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: RANDALL R. DUPLAK, LL.B., for the Director of Assessment;

A.W. COX, Q.C. and JAMES A. MUSGRAVE, LL.B., for Gulf Canada Limited.

M.G. WHALLEY, Q.C., for the City of Sydney.

DECISION

By Notice of Appeal dated September 23, 1985, the **DIRECTOR OF ASSESSMENT** (hereinafter called the "Director") appealed the decision of the Regional Assessment Appeal Court, Cape Breton Region, which allowed the appeal by **GULF CANADA LIMITED** (hereinafter called "Gulf") and disallowed the assessment of certain property referred to as "pumps, tanks, etc." to Gulf. The property in question is located on land in the City of Sydney owned by Sydney Steel Corporation.

The Notice of Appeal was filed with the Board on September 27, 1985, and was given Exhibit No. G-1 at the hearing of the appeal which took place on May 12, 1986, in the Civic Centre, Sydney.

The grounds of appeal as set out in the Notice of Appeal are as follows:

> "1. THAT the Regional Assessment Appeal Court erred in concluding that certain items described as 'pumps, tanks, etc.' should not be assessed to Gulf Canada Limited;
>
> 2. THAT the Regional Assessment Appeal Court erred in finding that Gulf Canada Limited occupies the subject property in an official capacity;
>
> 3. THAT the Regional Assessment Appeal Court erred in finding that 'the taxes on the tanks, pumps and other equipment is covered by the grant paid in lieu of taxes each year by the Sydney Steel Corporation to the City of Sydney including the year 1984';
>
> 4. THAT the Regional Assessment Appeal Court erred in allowing the appeal to it, and in disallowing an assessment of $500,000.00 respect of certain 'pumps, tanks, etc.' to Gulf Canada Limited;
>
> 5. SUCH other grounds that may appear from the evidence.
>
> It is requested that the Nova Scotia Municipal Board find that Gulf Canada Limited is assessable for certain property described as 'pumps, tanks, etc.' located on land owned by Sydney Steel Corporation but occupied by Gulf Canada Limited for its own purposes."

Counsel for the Director and Counsel for Gulf attended a "without prejudice" pre-hearing conference with the Board on April 29, 1986. At the conference, Counsel for the Director confirmed his intention previously expressed in a letter to the Board dated February 10, 1986, that he would make a preliminary motion to the Board at the commencement of the hearing that the Board is without jurisdiction to hear the matter. "The argument will be based on the position that it is a question of exemption and, therefore, the matter should be determined in the Supreme Court Trial Division". At the meeting held April 29, 1986, Counsel for Gulf and the Director indicated that they were in disagreement as to the facts.

The Board set down the hearing for May 12, 1986, on the understanding of Counsel that the Board would hear evidence and argument only on the jurisdictional question raised by Counsel for the Director and would in due course render a decision on this question. The Board would reconvene the hearing to hear evidence on the merits of the appeal only if it determined it has jurisdiction.

Counsel for the City of Sydney was notified of the proceedings and appeared at the hearing on May 12, 1986 but did not participate in the proceedings. He advised the Board that he was appearing as watching counsel only.

Counsel for the Director tendered Affidavits in proof of the service of the Notice of Appeal on those persons entitled to Notice under Section 100 s.s.(3) of the Assessment Act, R.S.N.S. 1967, c. 14. The Clerk of the Board forwarded a copy of the Notice of Hearing to Counsel for Gulf, the City Clerk for the City of Sydney, the Minister of Municipal Affairs and the Chairman of the Cape Breton Assessment Appeal Court. The Board being satisfied that all preliminary procedures had been properly carried out proceeded to hear the parties on the jurisdictional issue raised by Counsel for the Director.

The full text of the Regional Assessment Appeal Court's decision reads as follows:

> "DECISION
>
> This is an appeal by Gulf Canada Limited against the assessment of $500,000.00 on commercial equipment of the Sydney Steel Corporation, consisting of pumps, tanks, etc. and an assessment of $250,000.00 in respect of business occupancy.
>
> The Appellant is a body corporate that provides and distributes petroleum products in Cape Breton to the Sydney Steel Corporation (Sysco), from supplies stored in the tanks of the Respondent Sydney Steel Corporation and supplied to the Corporation as required from time to time.
>
> The Respondent the City of Sydney is a duly incorporated unit in which the plant of the Sydney Steel Corporation is situate, and the Sydney Steel Corporation is a Crown Corporation, incorporated under a special act of the Provice of Nova Scotia, R.S.N.S., Chapter 14, 1967 and amendments thereto, and is the owner of the commercial property assessed.
>
> The amount and manner of the assessment is not in issue.
>
> Section 3(1)(a) of the Assessment Act, Chapter 14 of the Revised Statutes of Nova Scotia, 1967, and amendments thereto, provides as follows:
>
> Exempt Property
> (1) The following property is exempt from taxation under this Act.
>
> (2) All property vested in Her Majesty or vested in any person for Imperial, Dominion or Provincial purposes, and either unoccupied or occupied by some person in an official capacity: if any such property is occupied by any person otherwise than in an official capacity, the occupant shall be assessed and rated in respect thereof, but the property itself shall not be liable;
>
> On the basis of the evidence before me I am of the opinion that the Appellant occupies the premises in an official capacity and that the taxes on the tanks, pumps and other equipment is covered by the grant paid in lieu of taxes

each year by the Sydney Steel Corporation to the City of Sydney including the year 1984 and that the assessment of $500,000.00 on the same is hereby disallowed. The assessment for business occupancy is confirmed."

Pre-Hearing memoranda on behalf of the Director and Gulf were filed with the Board.

The pre-hearing memorandum filed on behalf of the Director reads as follows:

"I - STATEMENT OF FACTS

1. The Respondent was assessed under the provisions of the Assessment Act for property tax for the year 1984 on 'pumps - tanks - etc. Sydney Steel Plant'.

2. The Respondent's position is that the assessed property is situate within the City of Sydney and is owned exclusively by the Sydney Steel Corporation.

3. That the Respondent does not agree that the property assessed to it is assessible to it under Section 3, Sub-Section (A) of the Assessment Act, or at all to it under the said Act or any other enactment.

4. That Section 30(1) of the Sydney Steel Corporation Act S.N.S., 1967 (2d Sess.), c.1 provides that all property of the Corporation is exempt from taxation.

II - ISSUES

1. Who is the owner of the pump, tanks, etc.?

2. Is the Respondent exempt from taxation?

III - ARGUMENT

1. Who is the owner of the property?

The Respondent is assessed as the owner of the pump, tanks, etc. located at the Sydney Steel Plant and situate within the City of Sydney. The question then arises as to who is the actual owner of the pump, tanks, etc. at the Sydney Steel Plant - the Respondent or Sydney Steel Corporation.

It is respectfully submitted that the determination as to whom is the owner of the subject property is not a matter within the jurisdiction of the Nova Scotia Municipal Board. This position has been taken by the Nova Scotia Municipal Board in a decision of Lloyd Robicheau dated the 19th day of February, A.D., 1985, wherein the Board held on page 8 of its decision as follows:

'With respect to whether the Appellant is the owner of the subject property in the opinion of the Board, that is a matter within the jurisdiction of the Supreme Court of Nova Scotia and not a matter that the Board can deal with and make a determination about on an appeal from a decision of the Regional Assessment Appeal Court.'

2. Is the Respondent exempt from taxation?

The issue raised here is whether or not the Respondent can claim an exemption under Section 3(1)(a) of the Assessment Act or an exemption based on Section 30(1) of the Sydney Steel Corporation Act.

It is respectfully submitted that a question of exemption is a question relating to the assessment and should be submitted to the Supreme Court or County Court under Section 108(1) of the Assessment Act.

The Nova Scotia Municipal Board, in the Philip Clay decision dated the 22nd day of March, A.D., 1984, on page 43 of its decision held that:

'In the opinion of the Board, the principle announciated by the Supreme Court in the Edgehill case logically should apply to a question of exemption from taxation under Section 40B(1) as it does to question of exemption under Section 3(1)(D).'

In the case of Edgehill School v. Town of Windsor and Director of Assessment (1979), 32 N.S.R. (2d) 363 (N.S.S.C. App. Div.) the Court held on page 268, paragraph 20 of its decision that:

'I do not think the Regional Assessment Appeal Court has jurisdiction to entertain the Town's appeal as to exemption.'

The Court further held at paragraph 22:

> 'The question of exemption is, in my opinion, undoubtedly a 'question relating to the assessment' which may be submitted to the Supreme Court or to the County Court under Section 108(1) and is not a question of the type excluded from Section 108(1) and reserved the Regional Court under Section 77.'
>
> It is respectfully submitted that the question as to whether or not the Respondent is entitled to an exemption under the Assessment Act or the Sydney Steel Corporation Act is a 'question relating to the assessment' and it is not within the jurisdiction of the Board to determine."

The Pre-Hearing Memorandum filed on behalf of "Gulf" indicates that Gulf is a corporation which provides and distributes petroleum products "particularly to Sydney Steel Corporation ('Sysco')" in Sydney at its steel plant. This memorandum states inter alia that:

> "1) Gulf appealed its 1984 assessment for 'pumps - tanks, etc. Sydney Steel Plant' to the Regional Assessment Appeal Court Cape Breton Region and there was 'an agreement as to the facts entered into by all parties' and a copy of this agreement is attached to the memorandum as Schedule 'A'; and
>
> 2) That Gulf first learned of the Director's intention to argue that the Board is without jurisdiction to hear the appeal when it received a copy of the letter from the solicitor for the Director to the Board dated February 10, 1986."

The position of Gulf is set forth in its Pre-Hearing Memorandum in paragraphs 12 to 14 inclusive which state as follows:

> "12. Purely for the purposes of these proceedings, and particularly with regard to the question of the Board's jurisdiction, and without prejudice to or limiting its rights should the appeal proceed, the Respondent agrees with what it understands the position of the Director to be, namely, that the Board has no jurisdiction to deal

> with this appeal because the grounds of such appeal are that it involves questions of 'exemption' or 'ownership' of the property assessed to Gulf.
>
> 13. If the Board decides that it has jurisdiction, then such decision must be based on a finding that the appeal does not involve a question of 'exemption' or 'ownership', but rather of the wrongful insertion of Gulf on the assessment roll.
>
> 14. Accordingly, Gulf submits that if that position of the Director is accepted by the Board either the Director should withdraw the appeal or the Board should decline to hear it because of lack of jurisdiction."

The Board requested Counsel for the Director and Counsel for Gulf to make opening statements.

Mr. Duplak on behalf of the Director, indicated that he would be objecting to the jurisdiction of the Board to hear the appeal by the Director because of some preliminary matters which he indicated could only be determined by a judge of the Supreme Court of Nova Scotia or by a judge of the County Court as he argued that the Board does not have the authority to determine these preliminary matters. Specifically he stated that the subject property is assessed in the name of Gulf but two issues arise and these two issues are:

1. Who is the owner of the subject property?

He suggested that there is some indication that Sydney Steel Corporation is the owner and the decision of the Regional Assessment Appeal Court supports that suggestion but he suggests it is not clear who the owner is and it could be Gulf.

2. Is the property in question exempt from taxation either by virtue of (a) Section 31 of the Sydney Steel Corporation Act; or (b) by virtue of Section 3(1)(a) of the Assessment Act?

Mr. Duplak indicated that ownership of the subject property and the question of exemption are the two areas which require determination and these two areas are outside the jurisdiction of the Municipal Board.

Mr. Cox on behalf of Gulf stated that Gulf does not oppose the motion made by Counsel for the Director that the Board does not have jurisdiction to hear the appeal.

Counsel for the Director, when asked by the Board as to the reason why the Director commenced the appeal to the Board if the Director was of the opinion that the Board lacked jurisdiction to hear the appeal, replied that he did not personally have conduct of the case at the time the appeal was launched and that he had subsequently been given the conduct of the case. It is to be noted that the Notice of Appeal filed as Exhibit G-1 was signed by M. Tyson as solicitor for the Director and Mr. Duplak subsequently informed the Board that he would be representing the Director at the hearing before the Board.

The Board indicated to Counsel that at this point in the proceedings the Board did not have any testimony before it in order to decide whether or not it had jurisdiction to hear the appeal on the merits. Counsel for Gulf indicated that he was prepared to lead evidence through two witnesses to indicate that Gulf is not the owner of the subject tanks, pumps, etc. which are the subject matter of the assessment in question and that Sydney Steel Corporation is the owner. The Board with the consent of Mr. Duplak agreed to hear evidence relating to the narrow issue only of who claimed ownership relating to the property subject to the assessment.

Counsel for Gulf called Hugh M. Vasey, an employee of Gulf for the past 26 years and presently the manager of property taxes for the company for Eastern Canada. Mr. Vasey testified that he has held that managerial responsibility since 1982. He indicated that he is responsible for the assessments of all properties of the company in Eastern Canada and ultimately for the payment of taxes respecting those properties. He indicated that he was familiar with the records of Gulf with respect to property ownership and the assessment of properties to Gulf. He was asked by Counsel for Gulf, "Does Gulf own the tanks, pumps, etc., which are the subject of this assessment?" Answer: "No". Question: "Have you ever seen any documents in your records that would indicate that Gulf Canada is the owner of this property?" Answer: "No there are no such documents". On cross-examination by Counsel for the Director Mr. Vasey was asked if Gulf Canada ever assumed the assets of New England Oil and his answer was "No". Mr. Vasey on questioning by the Board stated that the subject tanks etc. are located on land which he believes is owned by Sydney Steel Corporation. He further indicated on questioning from the Board that

Gulf does in fact use the subject tanks for the purposes of supplying oil to customers, mainly to Sydney Steel. He also indicated that a lease between Sydney Steel and Gulf is the only document he is aware of which gives Gulf the right to use the subject tanks. It was his understanding that the tanks etc. in question were built in 1949 but have only been used by Gulf for the past nine years.

Counsel for Gulf called as his second witness John D. Coffin an employee of Sydney Steel Corporation whose present position is Superintendent of Transportation and Raw Materials. Mr. Coffin is responsible for the purchase of all raw materials including petroleum products from Gulf. He is familiar with the lease between Gulf as seller and Sydney Steel Corporation as buyer (document number 5 of Exhibit G-9). He was asked by Counsel for Gulf: "Who owns the tanks, pumps etc. referred to in the lease? Answer: "Sydney Steel Corporation and these are leased to Gulf". Question: "To your knowledge were any of these facilities conveyed to Gulf?" Answer: "No they have not".

On cross-examination of Mr. Coffin by Counsel for the Director Mr. Coffin was asked, "How do you know these facilities are owned by Sydney Steel Corporation?" and he replied that he assumed that Sydney Steel Corporation owns them.

Counsel for the Director called Charles Hopkins the Regional Director of Assessment for the Cape Breton

Assessment Region. He indicated that the subject tanks, pumps, etc., are in fact assessed to Gulf. Previous to 1983 he indicated that they were assessed to various corporations including Golden Eagle Petroleum Corporation, the New England Petroleum Corporation and other corporations.

On cross-examination Mr. Hopkins was asked if he had ever seen any documents of title indicating that Gulf was the owner of the tanks, pumps, etc. and he replied "no" to that question. He was also asked if he made any inquiries of Gulf as to the ownership of these tanks, pumps, etc., and he again replied "no".

The facts of this case are unusual in that the Appellant, the Director of Assessment has seen fit to file an appeal with the Board pursuant to Section 100 s.s. (3) of the Assessment Act from a decision made by the Regional Assessment Appeal Court and having brought the appeal then comes before the Board to question the Board's jurisdiction to hear the appeal which he has initiated. If the Director was strongly of the opinion that the Board lacks jurisdiction to hear the appeal on the merits he could have simply withdrawn the appeal prior to the hearing before the Board. This procedure would have avoided the time and expense involved in the holding of a hearing. This obvious option open to the Director was not followed.

The position of the Director with respect to his argument concerning the Board's lack of jurisdiction is summarized above. It is, of course, not surprising that Gulf, the Respondent in these proceedings, is fully supportive of the Director in his contention that the Board is without jurisdiction. If the Board decides that it does not have jurisdiction and dismisses the appeal because of the lack of jurisdiction, the decision of the Regional Court stating inter alia that certain pumps, tanks, etc. should not be assessed to Gulf stands, at least for the assessment year 1984, which is the year that is under appeal.

Counsel for the Appellant in his Post-Hearing submission received by the Board on June 12, 1986, reiterated his position that the Board does not have jurisdiction to make a determination as to ownership or as to the question of exemption from taxation. He then states at page 6 of his submission that "The next question that must be addressed is whether or not the Board has the power to render a decision on these points or in the alternative, it must simply decline to hear the matter."

He then referred to the decision of the Appeal Division of the Supreme Court of Nova Scotia in Ballou v. Municipal Board et al (1985), 70 N.S.R. (2d.) 73 where MacDonald J.A. speaking for the Court stated at page 74 that:

> "The right of appeal, however, from the decision of the Regional Assessment Appeal Court to the Municipal Board is, in our opinion, restricted to decisions made within jurisdiction and does not therefore extend to the jurisdictional error made here by the Regional Assessment Appeal Court. Such error, in our view, can only be challenged by way of the prerogative remedies."

He then submitted that in the Ballou case, the Regional Assessment Appeal Court declined jurisdiction to hear an appeal from an assessment by the Regional assessor whereas in the subject case, the Regional Assessment Appeal Court did not decline jurisdiction but took jurisdiction and rendered a decision. He then argues that this Board does have jurisdiction "to hear an appeal and render a decision on a question of jurisdiction of the Board to determine the matter pursuant to the provisions of the Assessment Act. The Appellant is not asking the Board to undertake a judicial review of the Regional Assessment Appeal Court's decision as to whether or not it had jurisdiction, as was the case in the Ballou decision. The matter before the Board is by way of a hearing de novo or to put it in modern language, 'as if the matter was being heard for the first time'. The matter is not before the Board as an appeal as to rightness or wrongness of the Regional Assessment Appeal Court's decision, but before it de novo to determine the matter on the merits and to deal with questions of preliminary objections to the Board's jurisdiction."

The Board agrees with Counsel for the Appellant that the Board has the power "to render a decision dealing with the jurisdictional questions raised in this matter and make a determination on those questions."

Counsel for the Appellant in his Post-Hearing submission makes the following comments on pages 8 and 9 in support of the unusual position that the Director has taken in appealing to the Board and then questioning the Board's jurisdiction to hear the appeal, namely:

> "The Appellant raised the question of jurisdiction of the Regional Assessment Appeal Court to hear the matter because of the question of exemption at the Regional Assessment Appeal Court level. The Regional Assessment Appeal Court did not deal with the Appellant's question of jurisdiction and the Court rendered a decision. The Respondent has, not only appealed its 1984 assessment, but it has also appealed its 1985 and 1986 assessments, and these appeals to the Regional Assessment Appeal Court for 1985 and 1986 are still pending. At no time has the Respondent applied to the County or Supreme Court for determination as to the question of its exemption from taxation. The onus is on the taxpayer to establish its exemption from taxation and not on the Director of Assessment. If the Appellant does not pursue the question of jurisdiction before the Nova Scotia Municipal Board now, it will then have to deal with the 1985 and the 1986 appeals by the Respondent of its assessments. Surely, it is not the duty of the Appellant to make an application to the County or Supreme Court to determine whether or not the Respondent is the owner of the property and further, is exempt from taxation. The procedure taken by the Appellant in this matter (if the Board should find that it has no jurisdiction to hear the matter on the merits) will force the Respondent to have a determination made in the proper form."

It is the Board's duty in every case before it to make a determination that it has or has not jurisdiction. The Board in numerous cases has made determinations that it lacked jurisdiction to hear assessment appeals, in most cases on the basis that the Appellant did not comply with the provisions of the Assessment Act as to the timeliness of the appeal or because of the lack of service of the Notice of Appeal on certain persons named in Section 100 of the Assessment Act.

By reason of Section 101 s.s. (1) of the Assessment Act, the Board's duty is to "inquire into the matter de novo, and shall examine such witnesses and take such proceedings as are requisite for a full investigation of the matter."

At the conclusion of the proceedings held on May 12, 1986, the Board advised the parties that it reserved the right to reconvene the hearing if it was of the opinion that it should hear further evidence to assist it in coming to a decision. The Board has not seen fit to re-convene the hearing for this purpose.

If the Director was dissatisfied with the decision of the Regional Assessment Appeal Court and presumably that is the case as is evidenced by the filing of a Notice of Appeal to the Board, and he was of the opinion that the Board lacked jurisdiction to determine the ownership of the property subject to the assessment and also lacked jurisdiction to determine whether Gulf was entitled to an exemption from taxation, he presumably could have made an application under Section 108(1) of the Assessment Act by originating summons to the Supreme Court or the County Court for the determination "of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongly classified." This procedure was not followed although it was an option open to the Director.

It seems clear from the arguments presented by

Counsel for the Director that the Director seeks a determination on two questions, namely: (1) who is the owner of the subject property; and (2) is Gulf entitled to an exemption from taxation either under Section 3(1)(a) of the Assessment Act or under Section 30(1) of the Sydney Steel Corporation Act.

The Board agrees with Counsel for the Director that the Board does not have jurisdiction to determine ownership of property. The Board adopts the statement made in the Board's decision dated February 19, 1985, reported in Volume Four A/1985 of the Board's decisions respecting an appeal by Lloyd Robicheau where the Board stated at page 59 that:

> "With respect to whether the Appellant is the owner of the subject property, in the opinion of the Board, that is a matter within the jurisdiction of the Supreme Court of Nova Scotia and not a matter that the Board can deal with and make a determination about on an appeal from a decision of the Regional Assessment Appeal Court."

The Board also agrees with Counsel for the Director that a question of exemption from taxation is a question which the Appeal Division of the Nova Scotia Supreme Court in the Edgehill School v. Town of Windsor and Director of Assessment case (1979) 32 N.S.R. (2d.) 363 has ruled is outside the jurisdiction of the Regional Assessment Appeal Court to determine but is a question relating to the assessment which may be submitted to the Supreme Court or the County Court under Section 108(1) of the Assessment Act.

The Board, therefore is of the opinion that it lacks jurisdiction to hear this appeal because to do so would involve the Board making a determination of ownership of property and/or making a determination as to whether Gulf is entitled to an exemption from taxation.

During the course of the hearing, Counsel for Gulf tendered the "Agreement of Facts" which Gulf and the Director had entered into and which had been submitted to the Regional Assessment Appeal Court. He submitted that this agreement as to facts might be useful to the Board in determining the issue of jurisdiction. He further submitted that there was case law to indicate that such an agreement was binding on the parties not just for the hearing before the Regional Court but for all subsequent proceedings as well.

Counsel for the Director disagreed that the agreement of facts should be admitted at the hearing before the Board which is in the nature of a hearing de novo. He argued that the agreement of facts was restricted to the appeal before the Regional Court and not for all future appeals which might take place. However, he consented that the agreement of facts which had been signed by M. Tyson as solicitor for the Director at the time of the appeal before the Regional Court could be admitted for the purposes only of the motion he had made that the Board lacked jurisdiction to hear the appeal before the Board. He indicated that if the Board were to assume jurisdiction he was opposed to any further use of the agreement in question in a hearing on the merits of the case. The agreement lists nine documents copies of which are attached to the agreement. the Board agreed to accept in evidence the agreement of facts for purposes related only to the question of jurisdiction. This documentation was given Exhibit Number G-9.

The following is the full text of the agreement as to facts which had been submtted to the Regional Court:

> "IT IS AGREED by and between counsel for the Appellant and the Respondents that for the purposes of the trial of this appeal, the following facts shall be admitted and agreed upon without the necessity of proof by either or any of the parties herein:
>
> 1. THAT the documents contained in the List of Documents attached as Schedule 'A' may be introduced and admitted in evidence without formal proof and that copies of such documents may be introduced and admitted as originals.
>
> 2. THAT subject to Paragraphs 6 and 7 the assessment roll for the year 1984 has been duly prepared by the proper persons in authority with respect thereto and in accordance with the provisions of the Assessment Act, being R.S.N.S. 1967, Chapter 14, as amended, and that Notice of Assessment for the year 1984 was duly and properly given to and received by the Appellant.
>
> 3. THAT the assessed property which is under appeal is situate within the City of Sydney and is within the jurisdiction of the Regional Assessment Appeal Court Cape Breton Region.
>
> 4. THAT the Appellant was assessed under the provisions of the Assessment Act for property tax for the year 1984 on 'pumps-tanks-etc. Sydney Steel Plant'.
>
> 5. THAT the Appellant appealed the said assessment to the Regional Assessment Appeal Court Cape Breton Region and that the Appellant has duly given all required notices and that

> the appeal is properly before this tribunal.
>
> 6. THAT except that the Appellant does not agree that the property assessed to it should have been assessed to it or taxable to it, there is no dispute as to the manner or amount of the assessment.
>
> 7. THAT the Appellant does not agree that the property assessed to it is assessable to it under Section 3, subsection (a) of the Assessment Act, or at all to it under the said Act or any other enactment.
>
> 8. THAT nothing herein agreed to shall in any way prejudice or restrict the rights of the parties from adducing further evidence including any relevant and material documents.
>
> THIS AGREEMENT shall be binding upon the parties to this appeal for the purposes of the appeal."

Counsel for Gulf in his Post-Hearing Memorandum submits that the agreement as to facts "is binding on the Director in all proceedings arising out of this matter, namely, Gulf's appeal of its assessment for 'pumps-tanks, etc.'. There are no new "matters" or "causes" before the Board. The same matters are in issue as were in issue before the Regional Assessment Appeal Court, and as long as this is so the agreement as to facts is binding on the Director and all the various appeals that may deal with the same matters". Counsel for Gulf cited a number of cases in support of his submission, namely: Elton v. Larkins (1832), 172 E.R. 1020, Wetherell v. Bird (1835) 173 E.R. 3rd. and McDonald v. Murray et al (1884) 5 O.R. 559.

Counsel for Gulf requested that the Board "determine at this time, if it accepts jurisdiction, the binding effect of the agreement in any further proceedings before the Board so that the parties will know what evidence will be before the Board by way of agreement as to facts. In light of the Board's opinion that it lacks jurisdiction in this case it is unnecessary to make the determination requested. However, the Board has serious reservations about the admissibility and evidentiary employment of this agreement without the consent of the parties in a hearing before the Board, which is in the nature of a hearing de novo as is made clear by virtue of Section 101(1) of the Municipal Board Act. It would therefore appear that the agreement may not be binding upon the Director in an appeal before this Board. What Section 101(1) requires is a complete hearing anew.

In the result the Board dismisses the Appellant's appeal for lack of jurisdiction and awards costs to Gulf to be taxed on a party and party basis on the County Court scale.

The Board pursuant to Section 22(2) of the Municipal Board Act appoints Arthur E. Hare, Q.C., of Halifax to tax the costs awarded to Gulf.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of October, A.D., 1986.

RH Blois

R.H. BLOIS,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD

MUNICIPAL BOARD DECISIONS

VOLUME FIVE-B/1986

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

R.H. BLOIS, Q.C., — Chairman

ELIZABETH SALTON — Vice-Chairman

RICHARD L. WELDON — Member

* * * * *

DOREEN WHITE — Clerk

CLYDE A. PAUL. LL.B. — Counsel

THIS VOLUME CONTIANS ALL PLANNING. MUNICIPAL BOUNDARY AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1986 TO DECEMBER 31, 1986.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

DISCLAIMER RE: HEADNOTES

THIS VOLUME OF THE 1986 DECISIONS OF THE NOVA SCOTIA MUNICIPAL BOARD CONTAINS HEADNOTES WHICH SUMMARIZE THE DECISIONS. THESE HEADNOTES ARE NOT PART OF THE DECISIONS. THE MUNICIPAL BOARD WHILE IT HAS AUTHORIZED AND APPROVED OF THE PUBLICATION OF THESE HEADNOTES ASSUMES NO RESPONSIBILITY FOR THE CONTENT OR THE ACCURACY OF THE HEADNOTES.

PLANNING

CASE TABLE

Amherst (Town), Arenburg v. 233
Amherst (Town), Black v. 279
Annapolis Valley Stock Car Club v. Kings (County) 255
Arenburg v. Amherst (Town) 233
Askri v. Halifax (City) 586
Astro Management Ltd. v. Halifax (County) 387
Backman v. Halifax (City) 67
Bedford (Town), Union, Meadowview, Bridge and Nottingham Residents' Assn. v. 636
Black v. Amherst (Town) 279
Brown v. Halifax (City) 149
Cape Breton (County), Lee's Auto Salvage Ltd. v. 208
Cape Breton (County), Lynk v. 667
Cape Breton (County), Power v. 477
Cape Breton (County), Robertson v. 124
Dartmouth (City), Heritage Motors Ltd. v. 369
Dartmouth (City), Ummat v. 603
F.B. Spinney & H.P. Hanna Developments Ltd. v. Kentville (Town) .. 492
Glengarry Developments Ltd. v. Halifax (County) 445
Halifax (City), Askri v. 586
Halifax (City), Backman v. 67
Halifax (City), Brown v. 149
Halifax (City), Northwest Arm Heritage Assn. v. 1
Halifax (County), Astro Management Ltd. v. 387
Halifax (County), Glengarry Developments Ltd. v. 445
Halifax (County), Oakdene Estates Ltd. v. 571

Halifax (County), Three Star Developments Ltd. v. 290

Heritage Motors Limited v. Dartmouth (City) 369

Kentville (Town), F.B. Spinney & H.P. Hanna Developments
Ltd. v. 492

Kings (County), Annapolis Valley Stock Car Club v. 255

Kings (County), Village of New Minas v. 462

Lee's Auto Salvage Ltd. v. Cape Breton (County) 208

Lynk v. Cape Breton (County) 667

Mehta v. Truro (Town) 527

North Sydney (Town), Schuurkamp v. 414

Northwest Arm Heritage Assn. v. Halifax (City) 1

Oakdene Estates Ltd. v. Halifax (County) 571

Power v. Cape Breton (County) 477

Robertson v. Cape Breton (County) 124

Schuurkamp v. North Sydney (Town) 414

Spinney (F.B.) and Hanna (H.P.) Developments Ltd. v.
Kentville (Town)
[See F.B. Spinney and H.P. Hanna Developments Ltd.
v. Kentville (Town)] 492

Three Star Developments Ltd.v. Halifax (County) 290

Truro (Town), Mehta v. 527

Ummat v. Dartmouth (City) 603

Union, Meadowview, Bridge and Nottingham Resident s'
Assn. v. Bedford (Town) 636

Village of New Minas v. Kings (County) 462

PLANNING

STATUTE TABLE

CONSTITUTION ACT, 1982 [en. by the Canada Act, 1982 (U.K.), c.11. s.1] (Canadian Charter of Rights and Freedoms)

s.15(1), 24(1)
  Three Star Developments Ltd. v. Halifax (County) 290

INTERPRETATION ACT R.S.N.S. 1967, c.151

s.6(1)(y), 8(1), (5), 22, 23
  Brown v. Halifax (City) 149

s.6(1)(5)
  Village of New Minas v. Kings (County) 462

MUNICIPAL BOARD ACT, S.N.S. 1981, c.9

s.16(1)
  Arenburg v. Amherst (Town) 233
  Black v. Amherst (Town) 279
  Heritage Motors Ltd. v. Dartmouth (City) 369
  Lee's Auto Salvage Ltd. v. Cape Breton (County) 208
  Mehta v. Truro (Town) 527
  Oakdene Estates Ltd. v. Halifax (County) 571
  Power v. Cape Breton (County) 477
  Three Star Developments LTd. v. Halifax (County) 290
  Union, Meadowview, Bridge and Nottingham Residents' Assn. v. Bedford (Town) 636
  Village of New Minas v. Kings (County) 462

s.27
  Backman v. Halifax (City) 67

s.27(4)
  Lynk v. Cape Breton (County) 667

s.28
  Brown v. Halifax (City) 149

s.29
  Arenburg v. Amherst (Town) 233
  Black v. Amherst (Town) 279
  Heritage Motors Ltd. v. Dartmouth (City) 369
  Mehta v. Truro (Town) 527
  Village of New Minas v. Kings (County) 462

PLANNING ACT, S.N.S. 1969, c.16

s.1(i), 12, 33(2)(b), 35(1), (2)
Brown v. Halifax (City) 149

PLANNING ACT, S.N.S. 1983, c.9

s.3(k)
Village of New Minas v. Kings (County) 462

s.3(r), 35, 36, 37, 38(2)(p)(i)
Brown v. Halifax (City) 149

s.40
Backman v. Halifax (City) 67
Mehta v. Truro (Town) 527

s.41
Mehta v. Truro (Town) 527

s.42
Mehta v. Truro (Town) 527
Robertson v. Cape Breton (County) 124

s.43
Mehta v. Truro (Town) 527
Ummat v. Dartmouth (City) 603

s.43(1)
Oakdene Estates Ltd. v. Halifax (County) 571

s.51
Mehta v. Truro (Town) 527

s.51(1)
Oakdene Estates Ltd. v. Halifax (County) 571
Ummat v. Dartmouth (City) 603

s.52, 53, 54
Mehta v. Truro (Town) 527

s.55(1)
Brown v. Halifax (City) 149

s.59(4)
Oakdene Estates Ltd. v. Halifax (County) 571
Ummat v. Dartmouth (City) 603

s.60
Robertson v. Cape Breton (County) 124

s.60(1)
Ummat v. Dartmouth (City) 603

s.61,62
Robertson v. Cape Breton (County) 124

s.63
Backman v. Halifax (City) 67

s.63(1)
Oakdene Estates Ltd. v. Halifax (County) 571
Power v. Cape Breton (County) 477

s.63(1)(b)
Black v. Amherst (Town) 279
F.B. Spinney and H.P. Hanna Developments Ltd. v. Kentville (Town) 492
Heritage Motors Ltd. v. Dartmouth (City) 369
Lynk v. Cape Breton (County) 667
Ummat v. Dartmouth (City) 603

s.63(2)
Oakdene Estates Ltd. v. Halifax (County) 571
Three Star Developments Ltd. v. Halifax (County) 290

s.63(3),(4)
Black v. Amherst (Town) 279
F.B. Spinney and H.P. Hanna Developments Ltd. v. Kentville (Town) 492
Heritage Motors Ltd. v. Dartmouth (City) 369
Oakdene Estates Ltd. v. Halifax (County) 571
Three Star Developments Ltd. v. Halifax (County) 290
Ummat v. Dartmouth (City) 603

s.63(4)(c)
Glengarry Developments Ltd. v. Halifax (County) 445

s.63(5)
F.B. Spinney and H.P. Hanna Developments Ltd. v. Kentville (Town) 492
Heritage Motors Ltd. v. Dartmouth (City) 369
Oakdene Estates Ltd. v. Halifax (County) 571
Three-Star Developments Ltd. v. Halifax (County) 290
Ummat v. Dartmouth (City) 603

s.63(6)
Lynk v. Cape Breton (County) 667
Power v. Cape Breton (County) 477

s.63(7)
Black v. Amherst (Town) 279
Lynk v. Cape Breton (County) 667
Power v. Cape Breton (County) 477
Ummat v. Dartmouth (City) 603

s.66(1)
Brown v. Halifax (City) 149
Oakdene Estates Ltd. v. Halifax (County) 571

s.67(1),68
Brown v. Halifax (City) 149

s.71
Backman v. Halifax (City) 67
Brown v. Amherst (Town) 149
Northwest Arm Heritage Assn. v. Halifax (City) 1
Union, Meadowview, Bridge and Nottingham Residents' Assn. v. Bedford (Town) 636

s.71(1)
Arenburg v. Amherst (Town) 233

s.71(1)(a)
Village of New Minas v. Kings (County) 462

s.71(3)(4)
Arenburg v. Amherst (Town) 233
Village of New Minas v. Kings (County) 462

s.71(5)
Arenburg v. Amherst (Town) 233

s. 72
Robertson v. Cape Breton (County) 124

s.72(1)
Annapolis Valley Stock Car Club v. Kings (County) 255

s.72(2)
Astro Management Ltd. v. Halifax (City) 387

s.72(4)
Annapolis Valley Stock Car Club v. Kings (County) 255
Askri v. Halifax (City) 586
Astro Management Ltd. v. Halifax (City) 387

s.72(5)
Annapolis Valley Stock Car Club v. Kings (County) 255
Astro Management Ltd. v. Halifax (City) 387

s. 77(4)(5)
Mehta v. Truro (Town) 527

s. 78(1)
Mehta v. Truro (Town) 527
Schuurkamp v. North Sydney (Town) 414

s. 78(2)
Mehta v. Truro (Town) 527

s.78(3)
Mehta v. Truro (Town) 527
Schuurkamp v. North Sydney (Town) 414

s.83(1),85,86(2)
Lynk v. Cape Breton (County) 667

s.96(1), 103
Brown v. Halifax (City) 149

s.112
Lynk v. Cape Breton (County) 667

s.113,118,119,120(3)
Brown v. Halifax (City) 149

PLANNING

SUBJECT TABLE

Contract Zoning - refusal to approve a Development Agreement to allow a race track - whether reasonably carries out intent of MPS.
Annapolis Valley Stock Car Club v. Kings (County) 255

Contract Zoning - Approval of Development Agreement to permit mobile home park - aggrieved person - evidence as to effect of proposed development on valuation of property - Whether proposal consistent with intent of MPS.
Arenburg v. Amherst (Town) 233

Contract Zoning - refusal of Development Agreement to permit conversion of existing 4-unit building to an 8-unit building - whether reasonably consistent with intent of MPS.
Askri v. Halifax (City) 586

Contract Zoning - refusal to approve a Development Agreement to permit 51-unit apartment building - whether reasonably carries out intent of MPS.
Astro Management Ltd. v. Halifax (City) 387

Contract Zoning - approval of Development Agreement to permit eight storey, 70-unit apartment/commercial building - aggrieved persons - consistency with MPS.
Backman v. Halifax (City) 67

Contract Zoning - approval of a Development Agreement to permit 116-unit apartment building - "interested person" - "aggrieved person" - lot consolidation - "subdivision" lack of jurisdiction - whether reasonably carries out intent of MPS.
Brown v. Halifax (City) 149

Contract Zoning - approval of Development Agreement to permit mixed residential development on 28.5 acres of land on Northwest Arm - aggrieved persons - test to be applied.
Northwest Arm Heritage Assn. v. Halifax (City) 1

Contract Zoning - refusal of Development Agreement to permit convenience store - consistency with intent of MPS - not primarily intended to serve needs of local neighborhood.
Robertson v. Cape Breton (County) 124

Contract Zoning - approval of development agreement to permit three storey office building - whether "aggrieved person" - whether standing by agency or assignment.
Union, Meadowview, Bridge and Nottingham Residents' Assn. v. Bedford (Town) 636

Contract Zoning - approval of Development Agreement to permit four-unit apartment building - "aggrieved person".
Village of New Minas v. Kings (County) 462

Municipal Development Permit - refusal to permit construction and use of applicant's property as Doctor's office, computer store and residential rooms and related on-site parking - time within which to appeal - whether permit would be inconsistent with Land-use By-law - whether sufficient information to enable consistency to be determined.
Mehta v. Truro (Town) 527

Municipal Development Permit - refusal to permit a prototype facility for fish marination - whether inconsistent with Land-use By-law.
Schuurkamp v. North Sydney (Town) 414

Zoning Amendment - refusal to rezone from R-2 to C-4 to permit a convenience store - whether reasonably carries out intent of MPS - whether undue hardship - whether extraordinary and compelling circumstances.
Black v. Amherst (Town) 279

Zoning Amendment - refusal to rezone from R-1 to R-2 to permit duplex housing - whether reasonably carries out intent of MPS.
F.B. Spinney & H.P. Hanna Developments Ltd. v. Kentville (Town) 492

Zoning Amendment - refusal to rezone from R-1 to R-2 - whether reasonably carries out intent of MPS.
Glengarry Developments Ltd. v. Halifax (County) 445

Zoning Amendment - refusal to rezone from R-2 to C-2 to permit continuance of use as motor vehicle parking lot as part of automobile sales and repair business - whether reasonably carries out intent of MPS.
Heritage Motors v. Dartmouth (City) 369

Zoning Amendment - refusal to rezone from R-3 and R-2 to M-2 to permit salvage yard - whether inconsistent with or unnecessary for protection of best interests of Municipality.
Lee's Auto Salvage Ltd. v. Cape Breton (County) 208

Zoning Amendment - refusal to rezone from R-1 to C-2 - whether inconsistent with or unnecessary for protection of best interests of municipality - whether undue hardship or extraordinary and compelling circumstances.
Lynk v. Cape Breton (County) 667

Zoning Amendment - refusal to rezone from R-1 to R-2 to permit two unit dwellings in 14-lot subdivision - whether an appealable decision of Council - whether carries out intent of MPS.
Oakdene Estates ltd. v. Halifax (County) 571

Zoning Amendment - refusal to rezone from RR-6 to M-2 to permit salvage yard and vehicle maintenance building - protection of best interests of Municipality.
Power v. Cape Breton (County) 477

Zoning Amendment - refusal to rezone from R-1 to R-4 to permit apartment buildings - jurisdiction - service on Board after hours - Charter of Rights - Board must apply it - reasonably carry out intent of MPS.
Three Star Developments Ltd. v. Halifax (County) 290

Zoning Amendment - refusal to rezone from R-1 to R-2 - whether "refusal" - whether reasonably carries out intent of MPS - whether "undue hardship" or "extraordinary and compelling circumstances".
Ummat v. Dartmouth (City) 603

MUNICIPAL BOUNDARIES

CASE TABLE

Application by the Town of Port Hawkesbury to annex an area adjoining the southern boundary of the Town and presently within the Municipality of the County of Richmond.
Re: Port Hawkesbury (Town) 692

STATUTE TABLE

INTERPRETATION ACT, R.S.N.S., 1967, c. 151

s. 22(3)
Re: Port Hawkesbury (Town) 692

MUNICIPAL BOARD ACT, S.N.S. 1982, c. 9

s. 27, 29
Re: Port Hawkesbury (Town) 692

MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, R.S.N.S., 1967, c. 193

s. 8, 18
Re: Port Hawkesbury (Town) 692

MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S.N.S., 1982, c. 10

s. 6, 22(1)
Re: Port Hawkesbury (Town) 692

SUBJECT TABLE

Municipal Boudnaries - application to annex area of county adjoining town for industrial development - necessity or expediency - financial factors, burden of taxation - best interests of inhabitants of area, social implications.
Re: Port Hawkesbury (Town) 692

VILLAGE SERVICE ACT

CASE TABLE

Brooklyn (Village) 731

Waverley (Village) 743

STATUTE TABLE

MUNICIPAL BOARD ACT, S.N.S., 198, c. 9

s. 27(3)
Waverley (village) 743

VILLAGE SERVICE ACT, R.S.N.S., 1967, c. 329

s. 3(4), 12(1), 13(1), (3), 13A(1),(2)
Waverley (Village) 743

s. 14, 14A
Brooklyn (Village) 731

s. 38
Waverley (Village) 743

s. 43(1)
Brooklyn (Village) 731

s.61
Waverley (Village) 743

WATER ACT, R.S.N.S., 1967, c. 335

s. 17(1)
Waverley (Village) 743

SUBJECT TABLE

Village Service - Boundary description - best interests of inhabitants of area.
Re: Brooklyn (Village) 731

Village Service - Application to be incorporated as Village - best interests of inhabitants of area - no opposition to application.
Re: Waverley (Village) 743

Northwest Arm Heritage Association v. City of Halifax

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT MIXED RESIDENTIAL DEVELOPMENT ON 28.5 ACRES OF LAND ON NORTHWEST ARM--AGGRIEVED PERSONS--TEST TO BE APPLIED--PLANNING ACT, S. 71

This is an appeal pursuant to three separate Notices of Appeal by persons claiming to be "aggrieved persons" against a decision by the Council of the City of Halifax approving an application for a development agreement to permit the construction of a mixed residential development. The site in question is a 28.5 acre block of land on the Northwest Arm known as the "Edmonds Grounds" and zoned R-2 (Two Family Dwelling Zone). The proposed development is not a permissible as-of-right use under the R-2 Zone.

HELD: The appeal is dismissed for lack of jurisdiction since no one Appellant has proved the he or she is an aggrieved person.

Whether or not a person is an "aggrieved person" under the Planning Act will depend on the facts adduced at the hearing of the particular appeal. The Board here adopts its reasoning in the Riverlake decision to determine what constitutes an "aggrieved person." The Legislature in giving the privilege of appealing under the 1983 Planning Act to an "aggrieved person" rather than an "interested person," as under the 1969 Planning Act, clearly intended to restrict the category of persons who could appeal. The Board is obliged to interpret "aggrieved persons" not simply in the light of the ordinary dictionary meaning of these words but in the light of the judicial interpretation given them by Courts of competent jurisdiction, in particular the Appeal Division of the Supreme Court of Nova Scotia's decision in Halifax Atlantic Investments Ltd. To be an "aggrieved person," a person must have suffered a legal grievance. To do this a person must be able to prove that he has been denied some personal or property right or had imposed on him a burden or obligation. The Appellants have not discharged the onus on them. The Board did have adequate evidence relating to the proposed development to determine the effect of the development on the Appellants. The Board heard convincing evidence from three highly qualified and experienced accredited real estate appraisers that the proposed development would have no adverse effect on the value of the properties of the Appellants located in close proximity to the subject site. As to additional traffic generation, the traffic is already very heavy and the additional traffic would only have a nominal effect and not result in a devaluation of the Appellants' properties. As to density, that proposed will not exceed the allowable maximum density as of right under the present R-2 zoning. With respect to the Northwest Arm Heritage Association, it does not own real property which might be affected by the proposed development, nor has it been denied some personal or property right or had imposed upon it a burden or obligation.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: Appeals by the **NORTHWEST ARM HERITAGE ASSOCIATION, GRAHAM C. READ** and 19 others, and **SHERI WIENER** and 14 others, from the decision of the Council of the City of Halifax made on July 11, 1985, approving an application for contract development with **EDMONDS GROUNDS LTD. PARTNERSHIP** respecting lands located between the Purcell's Cove Road and the Northwest Arm in the vicinity of Melville Cove.

BEFORE: R.H. BLOIS, Q.C., Chairman
DARRYL W. WILSON, C.A., LL.B., Member
RICHARD L. WELDON, Member.

COUNSEL: ANNE S. DERRICK, LL.B., and SUSAN GRAHAM, LL.B., for the Appellants;

WAYNE ANSTEY, Q.C., for the City of HALIFAX;

PETER MacKEIGAN, LL.B., and DAVID H. REARDON, LL.B., for the developer, Edmonds Grounds Ltd. Partnership;

CLYDE A. PAUL, LL.B., for the Board.

DECISION

This hearing arose out of three separate Notices of Appeal filed under the provisions of s.s. (1)(a) of Section 71 of the Planning Act, S.N.S. 1983, c. 9, by persons claiming to be "aggrieved persons". All three Notices of Appeal relate to a decision made by the Council of the City of Halifax on July 11, 1985, which approved an application for contract development by **EDMONDS GROUNDS LTD. PARTNERSHIP** under Schedule "D", Section

66 of the City's Land-Use By-law, Mainland Area, to permit the construction of a mixed residential development, known as the Regatta Point Residential Development on a 28.5 acre block of land known as the **"EDMONDS GROUNDS"**, located south of the Armdale Rotary between Purcell's Cove Road and the Northwest Arm in the vicinity of Melville Cove and zoned R-2 (Two Family Dwelling Zone).

Subsequent to the filing of the Notices of Appeal and before October 15, 1985, when the hearing before the Board commenced, eleven of the persons who had signed Notices of Appeal abandoned their appeal by filing Notices of Abandonment with the Board. The names and addresses of those persons who abandoned their appeal are as follows:

Sheri Wiener	24 Armshore Dr.
Carol Fountain	24B Armshore Dr.
Patti Jensen	24A Armshore Dr.
Gagnia Johnson	22½ Armshore Dr.
Dean Risley	20 Armshore Dr.
Mert Mattice	20 Armshore Dr.
D. Scott Wiener	24 Armshore Dr.
Daniel Wiener	24 Armshore Dr.
D. L. McKeown	6 Armshore Dr.
Caroline McKeown	6 Armshore Dr.
George Gilfoy	3 Braeburn Rd.

After eliminating the 11 persons who abandoned their appeal there remained a total of 25 persons each of whom signed one of the three Notices of Appeal filed as Exhibits E-1, E-2 and E-3. These 25 persons and their addresses are:

1.	Northwest Arm Heritage Association of Halifax;	
2.	Graham C. Read	5 Herring Cove Road
3.	Dorothy B. Read	5 Herring Cove Road
4.	Russell Freeman	9 Herring Cove Road
5.	Margaret Freeman	9 Herring Cove Road
6.	Barry Dorey	6 Windermere Road
7.	Melanie Read Dorey	6 Windermere Road

8.	Bruce Tudoc	18 Fairmount Road
9.	Margaret Hamy	17 McFatridge Road No. 23
10.	Leona Byrne	17 Afton Drive
11.	Cyril Byrne	17 Afton Drive
12.	Sandra Pace	77 Purcell's Cove Road
13.	Charles Pace	77 Purcell's Cove Road
14.	John MacLennan	7A Herring Cove Road
15.	Margot Spafford	16 Reserve Road
16.	Audrey Mercer	23 Purcell's Cove Road
17.	Lydna Melling	71 Purcell's Cove Road
18.	John Naugle	5 Braeburn Road
19.	Deborah Naugle	5 Braeburn Road
20.	Marion Rosborough	55 Purcell's Cove Road
21.	Eva M. Huber	18 Armshore Drive
22.	Jenifer Rees	6980 Armview Avenue
23.	Ian McAllister	4 Armshore Drive
24.	Jeanette McAllister	4 Armshore Drive
25.	Paul B. Huber	18 Armshore Drive

The Board consolidated the three appeals and held a hearing of the appeal which took place over four days, October 15th, 16th, 17th and 18th, 1985.

At the commencement of the hearing, Counsel for the Appellants filed an Affidavit in Proof of Service of the Notice of Hearing (Exhibit E-4). Counsel for the City and for the developer submitted that the Board lacked jurisdiction to hear the appeals on the merits because of their allegation that none of the Appellants are "aggrieved persons" within the meaning of s.s. 1(a) of Section 71 of the Planning Act.

Section 71(1) of the Planning Act reads as follows:

> "Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, the decision of the council may be appealed by
>
> a) an aggrieved person;
>
> b) the Director;
>
> c) the council of an adjoining municipality."

Written briefs on the issue of whether the Appellants are qualified as "aggrieved persons" were filed by Counsel for the Appellants (Exhibit E-15) and Counsel for the developer (Exhibit E-16). Fourteen other exhibits were tendered and accepted by the Board at the hearing, including copies of the Municipal Planning Strategy (M.P.S.) filed as Exhibit E-13, the Land-Use By-law (Exhibit E-14) and a copy of a City Staff Report and Minutes of the Council (Exhibit E-12).

The Board proceeded to hear evidence relating to the status of the Appellants as "aggrieved persons" on the understanding that if the Board found any one or more of the Appellants to be aggrieved persons, then the Board would hear further evidence on the question of whether the decision of the Council could reasonably be said to be consistent with the intent of the M.P.S.

The subject site consisting of 28.5 acres of land is located in the Mainland Area of the City of Halifax and is Zoned R-2 (Two Family Dwelling Zone). It is bounded generally on the south by Melville Cove, on the east by the waters of the Northwest Arm, on the west by the Purcell's Cove Road and on the North by a school and residentially developed lands.

The permissible uses in the R-2 Zone (Mainland Area) are set out in Section 24(1) of the City's Land-Use By-law for the Mainland Area which states:

> "1. The following uses shall be permitted in any R-2 Zone:
>
> a) all R-1 Zone uses;
>
> b) a semi-detached dwelling;
>
> c) a duplex dwelling;

d) a basement apartment;

e) day nursery for not more than 35 children;

f) any use, other than a privy, accessory to any of the uses in (a), (b), (c), (d) and (e).

2. No person shall, in any R-2 Zone, carry out, or cause or permit to be carried out, any development for any purpose other than one or more of the uses set out in subsection (1).

3. No person shall, in any R-2 Zone, use or permit to be used any land or building in whole or in part for any purpose other than one or more of the uses set out in subsection (1).

4. Notwithstanding Section (1) herein, a basement apartment shall only be permitted in a single family dwelling."

The proposed development which is not a permissible as-of-right use under the R-2 Zone consists of 14 semi-detached dwellings, 166 townhouses and 336 two-bedroom apartments as the residential components. The apartment units are to be contained in four apartment buildings, two of which are to have a maximum height of 10 storeys and the other two are to have a maximum height of 3 storeys. The proposed development is to contain a commercial building having a maximum floor area of 24,000 sq. ft. this commercial building is to have the following permitted uses:

"(a) Drug Store
(b) Optician
(c) Laundry/drycleaning
(d) Hair Dresser - Beauty Salon
(e) Computer and Print Centre
(f) Yacht Shop
(g) Camera Shop
(h) Gift Shop
(i) Specialty Meat/Fish Store
(j) Bank - Cash Stop
(k) Sports Wear
(l) Health Club
(m) Portable Motor Sales and Repair Centre
(n) Offices"

The details of the proposed development are contained in a draft agreement between Edmonds Grounds Ltd. Partnership as the developer and the City, a copy of which is set forth on pages 15, 16, 18 and 19 of Exhibit E-12. A description of the proposed development is contained in a Staff Report to the City Council dated May 17, 1985, set forth on pages 1 - 10 inclusive of Exhibit E-12.

The application by the developer for approval of the proposed development was made under Schedule "D", Section 66(c) of the Land-Use By-law, Mainland Area. Section 66 reads as follows:

> "In any area shown as Schedule "D", any use shall be permitted which is permitted by the zoning designation of such area, provided that:
>
> a) R-4 uses shall not be permitted;
>
> b) C-1, C-2, I-1 and P uses shall not exceed 35 feet in height and shall not exceed 5,000 square feet in floor area;
>
> ba) No amusement centre shall be permitted,
>
> c) Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this By-law, provided that no approval shall be given inconsistent with the Municipal Planning Strategy or Section 5 of this By-law;
>
> d) Approval by Council under Subsection (c) above shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

The first witness on behalf of the Appellants was

Eva M. Huber, wife of Paul B. Huber. Mrs. Huber signed the Notice of Appeal filed as Exhibit E-1. Mr. and Mrs. Huber reside in and are the joint owners of property known as Civic No. 18 Armshore Drive which is a dead-end street running off the Purcell's Cove Road in a south easterly direction to the northwest boundary of the subject site. She indicated the location of her property by marking "Huber" on the City of Halifax Map filed as Exhibit E-5. Her property bears the L.R.I.S. property number 250068. Mrs. Huber values the property at 18 Armshore Drive at $200,000.00. She has resided at this property since 1975. She can see the subject site from her property which she states is in the same neighbourhood. She jogs, swims, sails and walks in her neighbourhood. She stated she was familiar with the proposed development and was concerned about the consequences of the development which she indicated would be increased traffic, air pollution and water pollution of the Northwest Arm. She was of the opinion that the development if approved would have an adverse and negative effect on the enjoyment of her property. She pointed out that Armshore Drive is a narrow street and street parking would be affected.

Mrs. Huber described her neighbourhood as being in a natural environment and the proposed development would give her a feeling of being "squeezed in". She expressed the opinion that if the site was developed in accordance with the approval given by the Council of the City it would not have any pecuniary effect on her property.

Mrs. Huber has resided in the City since 1965 and is a member of the Northwest Arm Heritage Association, one of the Appellants. She said she joined this association because of her concern about development in general on the Northwest Arm.

On cross-examination by Counsel for the developer, she repeated her assertion that there would be no pecuniary loss to her property and that properties generally have been increasing in value. She also admitted that she had no special qualifications as an appraiser. She also admitted that when she purchased her property on Armshore Drive, she was aware that the subject site known as the Edmonds Grounds was privately owned. She also was aware of the proposal by the developer to construct with the City's approval, a cul-de-sac at the south end of Armshore Drive. She expressed however, the view that Armshore Drive might be used for the parking of vehicles, transporting people to the development in question.

Mrs. Huber stated that she would prefer to see the Edmonds Grounds remain in their natural state. On further cross-examination after it was pointed out to her that the existing R-2 Zoning of the subject lands permits duplexes as well as single family dwellings and that there are presently apartment buildings, Churches, a Shell gasoline service station and an I.P.C. Store on the Purcell's Cove Road in her neighbourhood, she was asked why she objects to the proposed development which mainly consists of town houses and duplexes. She replied that "density" was her concern. She stated that although she had not appeared at the public hearing held by the Council, her husband had attended.

Mrs. Huber stated that the Northwest Arm Heritage Association had been incorporated in 1985 and had not been involved in any other matter or appeal.

Mrs. Huber was asked if she was aware of the Melville Ridge development on the south side of Melville Cove about a half-mile from the subject site. She stated she was not interested in this development and the Northwest Arm Heritage Association had not been formed when the Melville Ridge development was first discussed. She was asked if she was against all development for the subject site. She replied that she was against the particular development under appeal and was not against development which she considered compatible with her neighbourhood. It was suggested to Mrs. Huber that the R-2 Zoning of the subject site would permit on an as-of-right basis the same density as that proposed for the development under appeal.

Mrs. Huber was asked, what interest of yours has been prejudiced? Her answer was that her expectations had been breached. She was also asked, what have you lost? She replied that she had lost her way of life.

On re-examination Mrs. Huber stated that if the proposed development was phased in over a five-year period she could expect a certain amount of noise in that period from construction activity. Her expectations for the development of the site are that it would be in harmony with her environment.

The next witness called to testify on behalf of the

Appellants was Aubrey E. Mercer, one of the Appellants. She has been a resident of 23 Purcell's Cove Road for the past 21 years and stated that she is the owner of this property. She was asked to state the market value of her property but couldn't do so. She described her neighbourhood as a quiet suburban type area made up of single family dwellings. She enjoys recreational activities such as swimming, skating and sailing. She stated that she is familiar with the proposed development. Her concern is that there will be too many people living on the subject site. When asked on direct examination what would be the effect of the proposed development on her property, she responded that she didn't know. She had attended all the public meetings relating to the proposed development. She is a member of the Northwest Arm Heritage Association having joined because of her concerns about the community.

On cross-examination Mrs. Mercer stated that the property in which she lives is registered in her Husband's name. She said that her neighbourhood includes Cowie Hill. She marked her initials (A.M.) on the City of Halifax Map filed as Exhibit E-5 to show the location of the property where she resides. This property bears an L.R.I.S. property number 251934. It is on the west side of the Purcell's Cove Road opposite the southwestern corner of the subject site. The rear of her property has frontage on Braeburn Avenue which is a short street running from the Purcell's Cove Road to the Herring Cove Road. She was unable to state the zoning category of her property. She admitted that there was a gasoline service station a short distance from her property. She indicated that she was aware of the proposed development but was not aware of the number of persons that might reside on the subject site or the number of dwelling units which would be constructed on the site. Although not knowing these numbers she stated that there would be too many units on the site. On cross-examination she agreed that she gains access by car to her property from Braeburn Road, not from the Purcell's Cove Road. She was of the opinion that the proposed development would place more strain on the City's police and fire forces. Although she expressed concern over the Melville Ridge project her real concern was the development of the subject site which is closer to her home. She thought the lifestyle of the whole community would be changed as a result of the subject development.

When asked what interest of hers has suffered adversely because of the proposed development, she replied that there would be increased traffic and also she would be affected during the construction period. She was asked what right of hers was breached. She appeared to have some difficulty in answering these questions.

Mrs. Mercer said she is the Treasurer of the Northwest Arm Heritage Association which does not own any real estate. She indicated this association was incorporated the day before the appeal was filed. She said there was a meeting of the Association held to approve the filing of its appeal but this meeting was not held until after the filing of the appeal.

Dorothy B. Read, a resident of 5 Herring Cove Road and one of the Appellants was called as a witness by Counsel for the Appellants. She marked the location of her residence on the map filed as Exhibit E-5 with her initials (D.R.). This property, having an L.R.I.S. property number 223347, is located on the west side of the Herring Cove Road north of Chocolate Lake. This property is approximately 800 feet along the Herring Cove Road from the northwest corner of the subject site and 700 feet from the nearest point of the subject site. Mrs. Read's son, GRAHAM C. READ, also an Appellant, lives with her. She has lived in this property for 10 years. Her property is assessed at $93,500.00. She stated that she is able to see trees on the subject site from her home. She includes the subject site in her neighbourhood. Her property is zoned R-1. She stated that she expected the subject site to be developed with land uses permitted under the R-2 Zone. She had attended the public hearings held by the Council relating to the proposed development. She expressed the opinion that the proposed development would unfavourably affect her property and her neighbourhood. She considers the Northwest Arm to be a heritage resource. She is a member of the Northwest Arm Heritage Association.

On cross-examination, Mrs. Read emphasized the difficulty in gaining access to her property from the Herring Cove Road because of the existing heavy traffic flow. She identified as her neighbourhood, part of Armdale, the Armdale Rotary, a portion of the St. Margaret's Bay Road area, part of Kline Heights excluding Cowie Hill and Purcell's Cove including the land lying between the Purcell's Cove Road and the Herring Cove Road, a large portion of this area being zoned R-1 or R-2.

Mrs. Read did not know how many persons or dwelling units would be permitted on the subject site. She had not checked the allowable density in an R-2 Zone but she was of the opinion that the proposed development was far too dense for her neighbourhood. She was aware that the City had approved the Melville Ridge development which has access onto both the Purcell's Cove road and the Herring Cove Road. This development will house 600 persons.

When asked what interest of hers had been prejudiced by the proposed development she replied that additional traffic will pass her property. When asked what right owed to her had been breached by the Council she stated that her property is zoned R-1 and is surrounded by R-2 zoned properties. Thus she feels she has the right to be protected against more intense zoning by way of contract development. When asked what has she lost, she replied that she has lost a quiet residential area and the quality of life she presently enjoys.

On redirect examination Mrs. Read said that her property will be less desirable to her if this project goes ahead. She said she will not be able to see the wildlife, the existing trees on the subject site and the Northwest Arm itself. She feels that her house will be devalued on the market because of her loss of view.

Evidence was given by Graham C. Read, the son of

Mrs. Dorothy B. Read, and one of the Appellants. He resides at 5 Herring Cove Road but has no legal interest in that property which is owned by his mother. He defined his neighbourhood as encompassing Horseshoe Island, the Rotary, part of St. Margaret's Bay Road, Chocolate Lake, Melwood Avenue, Purcell's Cove Road and Melville Cove and includes the subject site. He stated that his neighbourhood is a mix of residential and commercial development. He is familiar with the subject site which is heavily wooded and which is inhabited by wildlife. He stated that one of the main features of the neighbourhood is the uninterrupted view of the Northwest Arm. His expectations regarding planning and development for the subject site are that it will be carried out within the scope of the existing zoning which would provide low density, low rise housing. He expects the Council to make informed decisions and to exercise its discretion wisely. He claimed to have a layman's knowledge of the City's Municipal Planning Strategy (M.P.S.).

Mr. Read stated that he will be affected by the proposed development in three respects. Firstly, in an aesthetic way by having his view of the Northwest Arm restricted. Secondly, by having a large number of persons coming into his neighbourhood causing a strain on services particularly recreational facilities. Thirdly by virtue of the anticipated increase in traffic on the Purcell's Cove Road which would be generated by the development. He said he would be personally affected because it would be more difficult to access his property by car. He expressed concern about the effect the proposed development would have on his neighbourhood and therefore became involved in this appeal.

Mr. Read is the President of the Northwest Arm Heritage Association (the Association) which was incorporated on August 7, 1985. He referred to the objects and purposes of the Association and stated that the Association was concerned with anything that might affect the Northwest Arm. He identified Exhibit E-6 as a copy of the Articles and By-laws of the Association. He stated that he would like to maintain the Northwest Arm in its present state.

The following are the six objects of the Northwest Arm Heritage Association:

> "a) to promote an understanding of the historical, aesthetic, ecological and recreational significance of the NORTHWEST ARM;
>
> b) to undertake activities intended to preserve and enhance the natural character of the NORTHWEST ARM and environs and to protect the amenity of the NORTHWEST ARM in order that it may be enjoyed by future generations;
>
> c) to ensure that the impacts on the NORTHWEST ARM of land use changes in the City of Halifax and in the municipality of the County of Halifax are fully examined;
>
> d) to communicate with all levels of government, with the membership and with the public regarding the NORTHWEST ARM;
>
> e) to become involved and participate in planning activities affecting the NORTHWEST ARM directly or indirectly;
>
> f) in general to carry out such activities which are not in conflict with the above."

Mr. Read said that the Northwest Arm Heritage Association was concerned with the preservation of the Arm. When asked on direct examination how would the Association be affected by the Council's decision he replied that it would be more difficult for the Association to carry out its objects.

Mr. Read had attended a public hearing held by the City on July 3, 1985, and had presented a brief at that time. After the Council's decision had been made approving the proposed development he and some citizens convened a meeting to consider forming an association. The Northwest Arm Heritage Association was formed on August 7, 1985 and a Notice of Appeal by the Association was signed on August 8, 1985 (Exhibit E-3). This Notice of Appeal was signed by Mr. Read as President and Eva M. Huber as Vice-President.

Mr. Read stated that he and some other persons held a meeting on July 29, 1985, and discussed the procedures necessary for an appeal. He indicated that he was not sure whether or not the Association would have standing as an Appellant and the citizens decided to appeal as a group. Later, the group decided that the Association would have standing and filed a Notice of Appeal. The group also decided to obtain legal counsel.

On cross-examination, Mr. Read admitted that neither he nor the Association owned real property in Halifax. He stated that he had not appeared at the public hearing held by the Council but his brief was read. He stated that the staff reports to Council respecting the proposed development should have been more extensive particularly regarding traffic and its impact. He thought that the proposed development would permit about 1500 persons to live there but was not certain as to the exact number. When asked if 1248 was the permitted number of persons, would that number be acceptable to him, he answered "no". When asked how many persons would be acceptable - he replied "400".

It was pointed out to Mr. Read that the proposed development is all residential except for the park area and that one-half of the proposed residential units are in apartment buildings. It was also pointed out to him that the Terrace View Apartment building is about the same distance to his place of residence as the subject site.

Mr. Read was asked on cross-examination what interest of his has been prejudiced replied that egress from his residence will be more difficult and it will change his view and change the character of the Northwest Arm. He was also asked what right owed to him has been breached. His reply was that the Council owed him a duty to make informed decisions. He said he believes that the property he will inherit from his mother will be devalued because of increased traffic. He said he thought that the duty owed by Council was more to the citizens then to the Association. When asked what interest of the Association has been affected, he replied that if the development goes ahead on the subject site, other such developments may go ahead as well.

On redirect examination, Mr. Read stated that with the existing apartments in the neighbourhood and the development of the subject site as proposed this would have a cumulative effect causing a significant increase in traffic and therefore a less desirable way of life for him will result.

Following the evidence of Mr. Read, Counsel for the Appellants indicated that this completed as of this time the evidence on behalf of the Appellants as to their status as aggrieved persons.

Evidence on behalf of the developer was given by Michael Turner, the President of Turner, Drake & Partners Ltd. Mr. Turner has had 23 years experience in real estate appraisal work. He was accepted by the Board as an expert witness in the field of real estate appraisal and land valuation. Mr. Turner, at the request of Edmonds Grounds Services Ltd. prepared a report which was tendered in evidence as Exhibit E-7. Mr. Turner stated that he was engaged to look at the properties listed on page 1 of his report to ascertain whether or not these properties would be injuriously affected by the construction of the proposed development of the Edmonds Grounds property. He did not carry out a formal appraisal of the properties referred to in his report.

The full text of Mr. Turner's report is as follows:

2 - t.

TURNER DRAKE + PARTNERS

rner drake + partners ltd.
182 north street,
alifax, n.s.
3k 1p5
l. (902) 429-1811

m.s. turner m.sc. aaci frics mai
r.j. escott bes
l. weatherby arics aaci

eal estate consultants + appraisers

13 September 1985

Dear Mr. Douglas:

Re: Edmonds Grounds, Purcell's Cove Road, Halifax

As requested, we have considered the matter of possible injurious affection to the following properties arising out of the proposed development of the Edmonds Grounds:

18 Armshore Drive, Halifax
4 Armshore Drive, Halifax
5 Herring Cove Road, Halifax
9 Herring Cove Road, Halifax
5 Braeburn Drive, Halifax
23 Purcell's Cove Road, Halifax
55 Purcell's Cove Road, Halifax
71 Purcell's Cove Road, Halifax
77 Purcell's Cove Road, Halifax
16 Reserve Road, Halifax
18 Fairmont Road, Halifax
17 Alton Drive, Halifax
6960 Armview Avenue, Halifax

ite of Edmonds Grounds

e originally inspected and appraised the property in December, 1979. We reinspected he property again on the 12th September 1985 for the purpose of this report. e are therefore familiar with the property as it exists today and also prior to he demolition of the former cottage homes that occupied portions of the site.

roposed Development

e have reviewed the proposed development of the property as shown on the plan ntitled "Edmonds Grounds Services Ltd. Regatta Point Residential Development, alifax, N.S. Schematic Development Plan". We are informed by your goodself that his is the plan approved by Halifax City Council that is currently the subject f an appeal. This plan shows development of the land with two 96 unit apartment uildings (each 7 storeys high), two 48 unit apartment buildings (3 to 4 storeys igh) and 170 townhouses and 6 duplexes. Our comments with respect to the effect

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of the Edmonds Grounds development refer to this plan.

We have also discussed the controls that will be imposed during development with Mr. P. Skerry, Paul Skerry Associates. We understand that Mr. P. Skerry is the architect responsible for the development plan. He informs us that architectural controls will be imposed to ensure maximum retention of tree cover, site controls during construction, compatible building elevations, massing and colour. He further informs us that each proposed building on the site will have to be approved by a design review committee. We have reviewed the Design Review Procedures and Design Guidelines. As an indication of the quality of the townhouse design, Mr. Skerry made available to us elevations and plans of one of the townhouse developments on which he himself is working. Our comments and opinions with respect to injurious affection are based on the assumption that these architectural controls will be implemented.

Injurious Affection - Methodology

In order to determine if there was any measurable injurious affection to the properties under consideration, we inspected them externally having particular regard to their juxtaposition and siting with respect to the Edmonds Grounds. Although a property may be injuriously affected i.e. suffer loss in value, from a number of causes, the major impact of a development such as that proposed for the Edmonds Grounds results from the following:

(1) Additional traffic past the affected property resulting in increased noise, fumes, visual intrusion, etc. A classic case would be a quiet street which is transformed into a busy thoroughfare.

(2) Close juxtaposition of a lower priced development with higher priced homes. This tends to reduce the value of the higher priced properties.

(3) Close juxtaposition of a high rise development with single family homes so that the latter are "overlooked" and hence dominated by the taller buildings.

(4) Loss of view. This can occur because the development is interposed between the affected property and the "view". It can also occur because the property being developed itself comprises the "view". The latter situation is particularly pertinent in this case. In gauging the impact therefore on the affected properties, we have had particular regard to the proposed development of the Edmonds Grounds as well as the siting of the affected property. The latter is important both in terms of the property's physical juxtaposition with the Edmonds Grounds and the view from the windows of the dwelling and the lot.

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Injurious Affection - Conclusions

(1) Additional Traffic

There are only two entrances proposed for the Edmonds Grounds. Both of these will discharge onto the Purcell's Cove Road. The occupiers of the 26 dwellings formerly located on the Edmonds Grounds used Armshore Drive as their primary vehicular access. Armshore Drive is narrow and often congested with parked vehicles. The properties under consideration fronting Armshore Drive (#4 and #18) will in our opinion benefit from the proposed cul-de-sac embodied in the design of the Edmonds Grounds redevelopment.

Although Purcell's Cove Road will have to carry increased traffic as a result of the Edmonds Grounds development, it is already a busy thoroughfare and in our opinion there will be no measurable adverse impact on the values of property fronting or having access to Purcell's Cove Road or Herring Cove Road.

(2) Juxtaposition with a Lower Priced Development

We understand that the freehold value of the townhouse lots on the proposed Edmonds Grounds development range between $45,000 and $65,000. In order to support these land values, the townhouses will have to be priced at well in excess of $100,000. Typically, lot values comprise 25% of the total value of the dwelling thus indicating values of $180,000 to $260,000. We understand that some of the proposed townhouses on the more expensive lots are being sold for $250,000. The townhouses occupy the majority of the streetscapes. We are informed that the apartment building sites have been sold at a unit price of $15,000 and $15,500. This is comparable to the figures achieved for prime apartment land on the Halifax peninsula and should ensure that the apartments too are of high quality.

Because the Edmonds Grounds are bounded by parks, water or institutional sites, their impact on surrounding property values is limited. The main spine roads for the development discharge onto Purcell's Cove Road. The properties in this area are worth substantially less than $100,000. The properties on the North West Arm side of Armshore Drive (#4 and #18) fall within the $100,000/$200,000 range and their values will not be adversely affected by the proposed development.

(3) Juxtaposition with High Rise Development

The apartment buildings are so located on the Edmonds Grounds that they do not dominate or overlook any of the surrounding residential development. In our opinion, there will be no injurious affection to any of the properties under consideration from the apartment development.

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(4) Loss of View

The properties under consideration were inspected having particular regard to their siting vis à vis the Edmonds Grounds. They are listed below together with our observations:

Property Address	Comments
18 Armshore Drive	This property is located to the north of the Edmonds Grounds and overlooks the North West Arm. It does not look out onto the Edmonds Grounds. There is no degradation in view or aesthetics because of the Edmonds Grounds development. The property is not injuriously affected.
4 Armshore Drive	This property is located to the north of the Edmonds Grounds and overlooks the North West Arm. It does not look out onto the Edmonds Grounds. There is no degradation in view or aesthetics because of the Edmonds Grounds development. The property is not injuriously affected.
5 Herring Cove Road	This property is physically so removed from the Edmonds Grounds as to militate against any injurious affection from the development. The dwelling is sited so that its predominant view is away from the Edmonds Grounds. The property is not injuriously affected.
9 Herring Cove Road	This property is physically so removed from the Edmonds Grounds as to militate against any injurious affection. The property is not injuriously affected.

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(4) Loss of View (cont'd)

5 Braeburn Drive	This property looks out on to the rear of other homes fronting the Purcells Cove Road. There is no degradation in view or aesthetics because of the Edmonds Grounds development. The property is not injuriously affected.
23 Purcell's Cove Road	This property is located near the Edmonds Grounds. However, it is sited to look out on to a green belt and the church property which is contiguous to the Edmonds Grounds. The property is not injuriously affected.
55 Purcell's Cove Road	This property is located near the Edmonds Grounds. However it is sited to look out on to the church property which is contiguous to the Edmonds Grounds. There is no degradation in view or aesthetics because of the Edmonds Grounds development. The property is not injuriously affected.
71 Purcell's Cove Road	This property looks out over Melville Cove to the North West Arm and the Edmonds Grounds. The property is currently being renovated. Although part of the property's view does encompass the Edmonds Grounds, we are of the opinion that any development thereon, is unlikely to result in any injurious affection. The Edmonds Grounds forms part of the seascape of Melville Cove and provided that the development proceeds in accordance with the development guidelines, there will be no degradation sufficient to cause injurious affection. Indeed the presence of major "quality" development in the area may have the reverse affect on what is, by comparison, a much lower priced property.

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(4) Loss of Value (cont'd)

77 Purcell's Cove Road	This property looks out over Melville Cove to the North West Arm and the Edmonds Grounds. Although part of the property's view does encompass the Edmonds Grounds, we are of the opinion that any development thereon, is unlikely to result in any injurious affection. The Edmonds Grounds forms part of the seascape of Melville Cove and provided that the development proceeds in accordance with the development guidelines, there will be no degradation sufficient to cause injurious affection. Indeed the presence of a major "quality" development in the area may have the reverse affect on what is, by comparison, a much lower priced property.
16 Reserve Road	This property looks out over Dead Mans Island and the North West Arm. This view would not be affected by the Edmonds Grounds development. There is no injurious affection to the property.
18 Fairmont Road	This property overlooks Chocolate Lake. Its view is not affected by the Edmonds Grounds development and it is physically well removed from it. There is no injurious affection to the property.

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(4) Loss of Value (cont'd)

17 Alton Drive	This property has no view of the Edmonds Grounds and is physically far removed from it. There is no injurious affection to the property.
6980 Armview Avenue	This property is located on the opposite side of the North West Arm to the Edmonds Grounds. The Edmonds Grounds are very visible from the property lot though the orientation of the dwelling is biased towards the Melville Island. The waterfront portion of the Edmonds Grounds visible from the property comprises the waterfront walkway and the Edmonds Park. There is no doubt that some of the proposed townhouses on the Edmonds Grounds will be visible, particularly during the winter. Although there is a good cover with mature pines, approximately 50% of the tree cover comprises hardwoods. Notwithstanding the foregoing, in our opinion, the property will suffer no injurious affection because of the Edmonds Grounds development. They are divorced from each other by the North West Arm and the property itself is located in an urban setting.

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Summary

In our opinion, the properties lited in this letter will suffer no loss in value i.e. injurious affection, as a result of the Edmonds Grounds development as presently proposed provided that the architectural and planning controls are properly implemented.

Yours truly,

TURNER DRAKE & PARTNERS LTD.

MICHAEL S. TURNER
President

Mr. R.W.B. Douglas
President
Edmonds Grounds Services Limited
Pacific Building
Barrington Street
Halifax, N.S.

On cross-examination Mr. Turner stated that he had not considered the impact of the construction period on the value of the properties referred to in his report. His conclusions were based on the long term effect of the proposed development on the neighbouring properties. He admitted he had not carried out an appraisal of any of these properties. To do so he would have been obliged to enter onto these properties and carry out an interior as well as an exterior inspection.

Mr. Turner was of the opinion that none of the owners of the properties listed in his report would suffer any monetary loss as the result of the proposed development being constructed.

With respect to the effect on property values resulting from the development in question, Mr. Turner was of the opinion that increased traffic does not produce lower property values unless the increase in traffic is substantial.

Although Mr. Turner was of the opinion that the project under consideration would not adversely affect the value of the properties referred to in his report he would not go so far as to say that the value of the neighbourhood properties would be enhanced.

Counsel for the developer called Boyd Algee the City's Development Officer for the past ten years. He is the person who administers the City's Zoning By-law. He identified Exhibit E-8 as a Zoning Map of a portion of the City including the subject site which he said was surrounded by lands zoned R-2 and C-1. He pointed out that 70% - 80% of the frontage of the subject site on the Purcell's Cove Road has C-1 zoned lands on the opposite side of the road. He stated that R-2 zoning permits a theoretical upper limit of 45 persons per acre but the average would likely be 30 - 35 persons. Mr. Algee stated that there are no density restrictions per se for R-2 zones in the Mainland South area of the City. He said Staff had recommended a density of 46 persons per acre for the subject site but the Council had cut this back to less than 46 persons per acre. He said that a subdivision plan of the subject site is required but he has not as yet received an application for subdivision approval.

Pat King a licensed realtor and qualified appraiser for 35 years was called by counsel for the developer. The Board accepted Mr. King as an expert qualified in the field of real property appraisal and land valuation. Mr. King identified Exhibit E-9 as a report prepared by him with a list of his qualifications and his background experience.

Mr. King's five-page report is reproduced in full as follows:

Pat King Appraisals

PAT KING

1891 Brunswick Street
Suite 200
Halifax, N.S.
B3J 3L8
(902) 423-1225
(902) 469-7733

Patrick King, F.R.I., A.A.C.I., M.A.I.
Charles Hardy, B.Sc., A.R.I.C.S., A.A.C.I.
Eric Piccott, A.A.C.I.
Fergus Omond, A.A.C.I., S.R.P.A.
Phil Leverman, A.A.C.I., C.A.
Jack Kehoe, A.A.C.I., F.R.I.

Chris Robinson, B.Sc., A.R.I.C.S., A.A.C.I.
Claude Lavoie, B. Comm.
Paul Fennell, B. Comm., C.R.A.

Newfoundland
Neil Hardy, B.Sc., A.R.I.C.S., A.A.C.I.
Kevin A. Fancey, C.R.A.

11 September, 1985

Mr. R.W. Douglas, President
Edmonds Grounds Services Limited
P.O. Box 89
Mahone Bay, Lunenburg Co., N.S.
B0J 2E0

RE: REGATTA POINT RESIDENTIAL DEVELOPMENT
EDMONDS GROUNDS, ARMDALE, HALIFAX, N.S.

Dear Mr. Douglas:-

As per your kind instructions, I have visited the Edmonds Grounds, reviewed two schemetic development plans, and visited the locations of a number of properties in the general area owned, or occupied, by a number of people who have petitioned against the Regatta Point Development as agrieved parties.

As I understand it, the purpose of my exercise is "to express an opinion as to whether or not the Regatta Point residential development will have any effect on the value of the properties should your development proceed according to the plans as mentioned above".

For record purposes, I would indicate I am quite familiar with this property as Pat King Appraisals appraised them in 1978, and over the years, for one reason or another, I have physically been on the land and discussed many aspects of possible development with various interested parties.

Yesterday, 10 September, 1985, I re-inspected the lands and found that most of the road system, as shown on the schematic development plan, have been cleared of trees, and it was relatively simple to relate that the road system has been cut out largely in accordance with your plans.

At the time of inspection, many of the trunks of the large pine trees removed from the road system were still piled on the property waiting to be removed, presumably to the mill.

Some of the houses, originally on the property, had already been removed and a work crew was in the process of demolishing another two-storey dwelling whilst I was inspecting the property yesterday.

It should be clearly understood I have not, in any way, attempted to express any opinion on specific values of the following properties, rather, I went by car to each property to physically see whether or not your development would have any adverse or enhancing effect on the value of these properties should your development proceed as planned.

For record purposes, my rough notes contain additional information not contained in this letter to you, and are available to expand this report should it be necessary to do so.

4 Armshore Drive
18 Armshore Drive

Armshore Drive is presently the entrance to the Edmonds Grounds and is a narrow street with what appears to be a mixture of single family, duplex and small apartment buildings located on both sides. On the southwestern side of the road, access to the properties is gained, for the most part, by steep, outside stairways; whilst on the northeastern side, these properties face on the Northwest Arm and do not experience the same kind of access and egress problems as they do on the opposite side.

It is proposed to make Armshore Drive a cul-de-sac which would eliminate any through traffic to the Edmonds Grounds as it presently exists.

The trees in the area of the turning circle on Armshore Drive have already been removed, and once this cul-de-sac turning circle is completed, it would be my opinion the residents in the area would have an improvement rather than a disadvantage because automobiles could turn easily around in the turning circle where now it is necessary to back up and let a car passing in the opposite direction squeeze by because of the narrowness of the road.

CONCLUSION

It is my opinion Armshore Drive will not be adversely affected as a result of your development plans, and if anything, making Armshore Drive a cul-de-sac with an adequate turning circle for property owners is a plus rather than a minus factor as it affects value.

18 Armshore Drive

The same comments apply to 18 Armshore Drive as they do to 4 Armshore Drive.

5 Brayburn Drive

This property is located on the other side of Herring Cove Road, and in my opinion, it is far removed from the proposed development to have no bearing one way or another on the value of this property.

Herring Cove Road, a major artery, is, in itself, a physical barrier separating this property from the proposed development, and it is doubtful whether or not the proposed development could even be seen from this property, let alone have any effect, one way or another, on its value.

5 Herring Cove Road

The same comments apply as ~~3~~ 5. Brayburn Drive. In summary, no effect on value, one way or another to the property.

9 Herring Cove Road

The same comments apply as 5 Brayburn Drive and 5 Herring Cove Road. In summary, no effect on value, one way or another, to this property.

23 Purcell's Cove Road

This property is located directly across the Purcell's Cove Road from the proposed development, but according to the schemetic drawings provided to me, there will be a 30 foot, treed, buffer strip on Purcell's Cove Road, and it is doubtful whether the new construction being built on the Edmonds Grounds would be seen from this property, and in any event, it is my opinion there will be no change in value, one way or another, to this property should the proposed development proceed as planned.

55 Purcell's Cove Road

This property appears to be a mixed commercial and residential use operating as James D. Rosborough, ship's and boating supply outlet, and is, in fact, located on what appears to be an old section of the original Purcell's Cove Road, and is, in fact, separated from the Purcell's Cove Road, as is presently used, by a 15 ft. or 20 ft. strip where the old road has been straightened out with the result that there is a large mound of earth between these two highway rights-of-way which partially obscures the Rosborough property from Purcell's Cove Road.

In conclusion, because this property is in itself a mixed-use property combining commercial and residential use, and because it is physically located away from the proposed development which, in all probability, would not even be seen from the Rosborough property, I am of the opinion that no effect in value will take place should the proposed development proceed as planned.

16 RESERVE ROAD

This property appears to have frontage on Northwest Cove in the immediate area of the Armdale Yacht Club, and appears to contain two separate structures, the larger of the two appears to be a renovated and winterized original summer home; whilst the other structure appears to be a newer, more modern structure which could be a separate cottage, or perhaps a well-built boathouse near the water.

The access to this property is by way of a very narrow and short roadway which may, or may not, be a public highway or private right-of-way.

It is quite possible, once the development takes place on the Edmonds Grounds, some of the buildings could be seen from the shore location of this property, but assuming the development plans proceed as outlined in the schemetic drawings with the retention of the beautiful pine trees and other tree cover, it is my opinion that this property will not be affected one way or the other by the development as planned.

CONCLUSION

After physically inspecting the locations of the properties outlined above, I am of the opinion that none of these properties will be adversely affected as to their present value by the development as proposed, but rather those properties mentioned above on Armshore Drive could derive some additional benefits which could enhance their values as a result of the construction of the cul-de-sac and the elimination of the through street to the present Edmonds Grounds.

Yours sincerely,
PAT KING APPRAISALS

P. King

Patrick King, F.R.I., A.A.C.I., M.A.I.
Accredited Appraiser

PK:dm
Encl.

N.B. Enclosed with this letter are two copies of the Regatta Point Residential Development Concept Plans for reference purposes.

Mr. King's conclusion is that the proposed development will have no adverse effect on the properties listed in his report. He stated that he had been advised the project would result in 1238 persons occupying the site when completed. This would result in a density of forty-three persons per acre $(\frac{1238}{28.5} = 43)$.

On cross-examination Mr. King stated that the construction period of a development creates a nuisance factor which everybody has to live with. His report considers the effect of the development when completed on other properties. He stated that he ignored the construction phase of the development in considering effect on values because construction is normally a short term matter.

Counsel for the developer called Philson J. Kempton, an accredited appraiser who has been engaged in real estate matters since 1968. He is the President of Kempton Appraisals Ltd. Mr. Kempton was accepted by the Board as an expert in real estate appraisals. He prepared a report dated September 16, 1985, filed as Exhibit E-11. The purpose of his report is to indicate to the developer of the Regatta Point his opinion of the effect of the proposed development on certain properties listed in the report. The full text of Mr. Kempton's report is as follows:

K A L

Kempton Appraisals Limited

Interprovincial Real Estate Appraisers, Analysts and Counselors
Member of "Valuation Network" Limited
376 Portland St, Dartmouth, N.S. B2Y 1K8
(902) 465-3000

16 September 1985

Mr. R. W. B. Douglas
Edmond Grounds Services Ltd.
Pacific Building
Barrington Street
Halifax, N. S.

Dear Mr. Douglas:

Re: Regatta Point Residential Development

Subject to your request, I have inspected the subject property and surrounding properties on the ground, from architectural plans as well as a scale model of the project in order to get a good comprehension of the layout, mix and overall appearance of the above-mentioned project from within and surrounding area.

The purpose of this report is to indicate to the developer of the Regatta Point, the appraiser's opinion of the affect of the proposed development upon the following properties:

(1) 17 Alton Drive - Byrne Property
(2) 4 Armshore Drive - McAllister Property
(3) 10 Armshore Drive - Huber Property
(4) 6980 Armview Drive - Rees Property
(5) 5 Braeburn Drive - Naugler Property
(6) 18 Fairmount Drive - Tudor Property
(7) 5 Herring Cove Road - Read Property
(8) 9 Herring Cove Road - Freeman Property
(9) 23 Purcells Cove Road - Mercer Property

(10) 55 Purcells Cove Road - Rosborough Property
(11) 71 Purcells Cove Road - Melling Property
(12) 77 Purcells Cove Road - Pace Property
(13) 16 Reserve Road - Spafford Property

Regatta Point Development:

The proposed development of the former Edmond Grounds is considered by the appraiser to demonstrate exceptional planning, utilizing the property at its highest and best use while at the same time retaining a lot of the property very much in its natural wooded state.

Large park areas will not only offer portions of this beautiful site for public use, but will also screen much of the development from adjacent properties allowing it to blend in with the surrounding neighbourhood.

A walkway (greenbelt) along much of the waterfrontage will allow occupants/owners of the development as well as the public direct access to much of the subject properties waterfrontage on the Northwest Arm.

The quality of the housing proposed for the Regatta Point Project will be excellent with values to range up to $250,000 for the townhouses while the apartment complexes will be in keeping with the quality of the proposed townhouse units.

On the following pages, the appraiser will comment briefly on the style, quality, condition and location of each of the appellant properties before listed, with a summary statement on each property as to the affect of the proposed development as approved City Council.

The properties will be deal with in alphabetical order by street address.

(1) 17 Alton Drive - Byrne Property:

Modest 1 1/2 storey house, appears to be in good condition. located rear of Cowie Hill, off Quarry Road, immediately adjacent and across the road from what was or is Keddy's Nursing Home.

This property is considered to be totally removed from the subject neighbourhood. Neither the subject property nor the Northwest Arm are visible from the Byrne Property.

Development of the former Edmond Grounds as approved by City Council is considered to have no negative affect on the value of the Bryne Property.

(2) 4 Armshore Drive - McAllister Property:

Small, average, 1 3/4 storey house in good condition. Small well landscaped lot on the Northwest Arm, about 800+- feet northwest of the proposed development.

Access to 4 Armshore Drive is directly off Armshore Drive at Herring Cove Road. Armshore Drive is a very narrow roughly paved street having poor access onto Herring Cove Road and because of the density of development on the street and lack of driveways and/or parking spaces, it is often congested with tenants and/or owners' vehicles.

As a street, Armshore Drive terminates at the boundary of the subject property without a cul-de-sac at present, but has and does provide access to the former Edmond Grounds.

Development of the Edmonds Grounds, as approved by City Council, will see a cul-de-sac developed at the end of Armshore Drive easing the current traffic congestion somewhat, as well, having a park area (greenbelt) to screen the project from Armshore Drive.

The project is not considered to have any negative affects on the value of the McAllister Property. If anything, it will quite possibly increase in value because of the proximity to a quality development in addition to the improved access and less traffic on Armshore Drive.

(3) 18 Armshore Drive - Huber Property:

Small, 1 1/2 storey average quality house in good condition, well landscaped, steep driveway to basement garage. Very close to adjacent properties, a few of which are more than one unit per building.

As previously mentioned, Armshore Drive is a narrow, congested street, and with approval of the Regatta Point Development, will have less traffic and because of the quality of the proposed, the affect on the value of properties on Armshore Drive, including the Huber property, is considered to be positive, not negative.

(4) 6980 Armview Drive - Rees Property:

Excellent quality, 1 1/2 storey dwelling in very good condition, with waterfrontage on the east side of the Northwest Arm (on the opposite side of the Northwest Arm from the subject property). The Rees property is located in a very good neighbourhood totally removed from the subject except for the fact it is visible across the Northwest Arm 1/4 mile +- (1320+- feet or 400 meters more or less).

Development of the Regatta Point Project, as approved by City Council with the excellent quality housing project, maintaining much of the natural wooded state, is not considered to have any negative affect on the Rees property.

(5) 5 Braeburn Drive - Naugler Property:

Modest, 1 1/2 storey dwelling located in an area of similar housing, commercial properties and churches. It is located just off the Purcells Cove Road almost directly across from the Catholic Church. The Naugler house is located rear of the houses which front on the street and it has a partial view of the southwest corner of the subject property along Purcells Cove Road.

Because of the excellent quality of the development approved for the subject property, the value of the Naugler will, in all probability, be enhanced.

(6) 18 Fairmount Road - Tudor Property:

Small, average quality, 2 storey house on a quiet, narrow street which runs off St. Margarets Bay Road adjacent to Keddy's Hotel with Tudor property backing onto/or near Chocolate Lake.

This property is far removed from the subject property and will suffer no loss in value because of the development as approved by City Council.

(7) 5 Herring Cove Road - Read Property:

Bungalow style house in good condition, good landscaping. Located high on a cliff above Herring Cove Road, looking out over the Armdale Rotary. Access to the site is via a steep, narrow, paved road called Windermere Road, which is nearly opposite the intersection of Armshore Drive and Herring Cove Road.

Development of the subject site, as approved by City Council, in all probability will not be visible from the Read property and the overall affect of the development will not be negative, but positive because of the quality of the Regatta Point Residential Development.

(8) 9 Herring Cove Road - Freeman Property:

1 3/4 storey, older house in good condition. Located in same area as #5 Herring Cove Road with access to the site being off the before-,mentioned narrow, steep, roadway called Windermere Road.

Because of tree cover and a hill between 9 Herring Cove Road and the subject property, it will, for the most part, be screened from the approved project.

Similar to 5 Herring Cove Road, the Freeman property will not suffer a negative affect because of the development as approved by City Council.

(9) 23 Purcells Cove Road - Mercer Property:

Small, 1 1/2 storey house, average quality, in very good condition located on opposite side of Braeburn Drive from the Naugler property. Its location (23 Purcells Cove Road) may be further described as being across Purcells Cove Road from the southwest corner of the subject property and being directly across from the Catholic Church.

Because the quality and value of the houses within the proposed project will be much greater than that of the Mercer property, the development will have a beneficial affect on the Mercer property.

Retention of as many of the trees as possible will help blend in the approved project with the surrounding properties.

(10) 55 Purcells Cove Road - Rosborough Property:

2 storey house with 1 storey addition, fairly old dwelling, but appears to be in good condition. Its location is on the Old Purcells Cove Road, west of the new road, opposite Melville Cove. Good view of the cove and the southern portion of the subject property.

Because of good planning illustrated by the development, combined with the quality of the approved development, the Rosborough property will not suffer any negative affects in value.

(11) 71 Purcells Cove Road - Melling Property:

Very small, average quality, 2 storey dwelling in fairly good condition (being renovated/located southeast of Rosborough Property mentioned above and being on the opposite side of the road from Melville Cove.

For the same reasoning as set out above for the Rosborough property, the Melling property will also not be negatively affected by the approved development proposed for the former Edmond Grounds.

(12) 77 Purcells Cove Road - Pace Property:

Very small, average quality, 1 1/2 storey, modest dwelling in very good condition. Located very near #71 Purcells Cove Road mentioned above. Same comments apply as to the Melling and Rosborough properties. No negative affects on value.

(13) 16 Reserve Road - Spafford Property:

Small bungalow located on land below the grade of Reserve Road. The property appears to be in very good condition.

Reserve Road is a crushed stone street which runs off Purcells Cove Road and also provides access to the Armdale Yacht Club which totally screens the Spafford property from the proposed development on the former Edmond grounds.

The quality and value of the Spafford property in relation to the approved development would be much lower and further the Spafford property will not suffer any negative affect on its value because of the development as proposed.

Summary:

The Edmond Grounds has in recent years existed as a parcel of privately owned woodland with frontage on the Northwest Arm, having some 20 mostly rundown houses, some perhaps considered to be little more than shacks, located thereon.

Access to the site was via the already congested Armshore Drive.

The developer is proposing an excellent quality, mixed-density residential development which the appraiser considered to represent the highest and best use of the site.

Because of the care taking in the planning and development of this proposed project which will have very strict guidelines to control its development, the overall affect of the project will be a positive one for the city and none of the other properties discussed in this brief will suffer any loss in value as a result of the proposed development.

Often owners of properties near a development are opposed to the development because they do not want changes.

Growth of a city is a nature process and as long as the growth is carried out demonstrating the good planning and control as illustrated by the Regatta Point Residential Development, all owners and tenants in the area and city, in general, will benefit from such a project.

Respectfully submitted,

....
Philson J. Kempton, AACI, FRI
Accredited Appraiser Canadian
Institute

PJK/dg

STATEMENT OF LIMITING CONDITIONS & ASSUMPTIONS

The appraiser has calculated the area of the subject site from information available. If by resurvey of the subject site, the area can be shown to vary from what has been used in this report, then value should be changed accordingly.

The appraiser does not assume any responsibility for matters which are legal in nature.

This report and appraisal are based on the premise that the subject property is free and clear of all indebtedness and that the property is clear of all encumbrances, legal and special assessments.

While it is believed that information gathered from others is accurate, the appraiser cannot assume any responsibility for its correctness and the appraiser does not assume any liabilities for error in analysis or in judgment other than his own.

The appraiser is not required to give testimony or attendance in court by reason of this appraisal, with reference to the property in question unless arrangements have been previously made.

The appraiser reserves the right to review all calculations referred to in this report and, if considered necessary, to revise his opinion in the light of any new facts, trends or changing conditions existing at any date prior to or at the valuation date which became apparent to him subsequent to the date of this report.

(Statement of Limiting Conditions & Assumptions Cont'd.)

Possession of this report or a copy thereof does not carry with it the right of publication nor may it be used for any other purpose for which it was made, by any but to whom the report is addressed, without the written previous consent of the appraiser or the addressee, and in any event, only in its entirety.

It is assumed that there are no hidden or unapparent conditions of the property or subsoil that would render it more or less valuable. No responsibility is assumed for such conditions or for engineering that might be required to discover these factors.

CERTIFICATE OF APPRAISER

I the undersigned appraiser, do hereby certify that I personally inspected the described property in this report, and considered all factors affecting value thereof.

I certify that I have no present or contemplated interest in the property appraised, and the fee charged is in no way contingent upon the value determined.

I further certify that to the best of my knowledge and belief, the statements and opinions contained in this report, subject to the limiting conditions herein setforth, are correct.

....
Philson J. Kempton, AACI, FRI
Accredited Appraiser Canadian
Institute

/dg

On cross-examination Mr. Kempton stated that he had not put a dollar value on any of the properties referred to in his report. He indicated that in addition to viewing the properties referred to in his report he also viewed other properties in the vicinity. Although he said there would be some temporary disturbance caused by construction, he was of the opinion that the construction of the proposed development will not have any adverse effect on other properties.

Mr. Kempton stated that the installation of a cul-de-sac on Armshore Drive would improve the street. He stated that he had looked at the implications of the expected traffic increase resulting from the development and was of the opinion that this increase would not adversely effect any of the properties shown in his report.

He was of the opinion that none of the properties he viewed would be deprived of a view which would result in a decreased monetary value of the properties.

Following the evidence of Mr. Kempton the Board heard argument from counsel as to the status of those Appellants as aggrieved persons who had given evidence. Counsel for the Appellants reserved the right to call further evidence as to the status of the other Appellants if the Board should determine that none of the Appellants who had been heard were "aggrieved persons".

Written briefs were filed with the Board on the issue of standing; the Appellants' brief being filed as Exhibit E-15 and the developer's brief being filed as Exhibit E-16.

After hearing argument of counsel on the question of whether those Appellants who had testified were aggrieved persons, the Board adjourned and on the resumption of the hearing announced that it had decided that the Appellants, Mrs. Eva Huber, Mrs. Audrey Mercer, Mrs. Dorothy Read, Mr. Graham Read and the Northwest Arm Heritage Association were not "aggrieved persons" within the meaning of Section 71(1) of the Planning Act and the Board's reasons would be given in its written decision.

At the request of counsel for the Appellants the Board adjourned the hearing to the 18th day of October 1985 to hear further evidence as to the status of other Appellants.

On October 18, 1985, when the hearing reconvened, Counsel for the Appellants announced that she no longer represented two of the Appellants, Ian MacAllister and Paul Huber but she did represent the remaining Appellants. She indicated that she would not adduce any further evidence but that Ian MacAllister and Paul Huber wished to testify on their own behalf on the question of their status as "aggrieved persons". Counsel for the developer and counsel for the City agreed that the Board could hear these two Appellants. The Board then proceeded to hear the evidence of Ian MacAllister and Paul Huber.

Ian McAllister, a Professor of Economics at Dalhousie University and a resident of 4 Armshore Drive, testified on his own behalf for the purpose of showing that he, as an Appellant, is an aggrieved person. His name and that of his wife Jeanette appear on the Notice of Appeal filed as Exhibit E-2. Both signatures appear to be in the same handwriting. On being questioned by the Board as to who signed his name to the Notice of Appeal he stated that it was neither his nor his wife's signature but he assumed that Mrs. Huber had signed on behalf of he and his wife as both of them were away at the time the Notice of Appeal was dated (August 7, 1985). He stated that he and his wife had authorized Mrs. Huber to sign the Notice in their absence. Rule 3 of the Board's Rules of Practice and Procedure respecting appeals under the Planning Act provides for a Notice of Appeal to be signed by a person's agent "lawfully authorized". The Board accepted Professor McAllister as a nominal Appellant subject to proving that he is an "aggrieved person".

Professor McAllister gave a definition of "aggrieved" which he said came from the Oxford Dictionary. It is being made resentful by unfair treatment. He did not cite any particular edition of the Oxford dictionary. He stated that he felt resentful because the project in question is being railroaded over the objection of many of those living in the neighbourhood. He said that the rationale for the Northwest Arm Heritage Association was to protect the Northwest Arm as a whole. He said that the initial ideas for this association were discussed at his home by a small group at the time when the development proposed for the Jubilee Boat Club property was before the City Council long before the proposed development of the Edmonds Grounds was under consideration by the City. His concern was the question as to where this kind of erosion of the environment of the Northwest Arm was going to lead.

Professor McAllister bought his home on Armshore Drive in 1973 because of the attractiveness of that location and with the feeling that the Council would not permit development in his neighbourhood which was not in harmony with his neighbourhood. By neighbourhood he means the "area one walks around with a degree of frequency and does not need a car to reach".

Professor McAllister, after citing City-Wide Policies 1.1.3, 1.2 and 1.7 respecting residential environments in Section II of the M.P.S., said that he was of the opinion that the density of the proposed development was in substantial conflict with what he interpreted to be the spirit of the M.P.S. and he therefore considered himself aggrieved. He expressed the view that the Board by adopting a narrow interpretation of the meaning of the words "aggrieved person" would deprive persons like himself who felt aggrieved of having a proposed development dispassionately reviewed on its merits. He thought that "the intent of the Board as a safety value to facilitate good planning practices itself could be in jeopardy if the word "aggrieved" is identified too narrowly".

He says he is aggrieved because he believes the character of his neighbourhood is now threatened by a far more dense project at the end of the lane (Armshore Drive). He stated that his grievance is much broader than one based in narrow financial terms but nevertheless he does feel his investment in his home is at risk and his home is jeopardized in value because of its location at the very entrance to Armshore Drive. He expressed concern that large numbers of persons would use his street to access the proposed development. He also stated that he was not assured by the evidence of the realtors who testified that the value of his property would not be lowered by the development proposed. He indicated that he would be assured if these realtors provided him with guarantees.

On cross-examination, Professor McAllister was asked what right of his, or duty owed to him, was breached. His answer was that the spirit of the M.P.S. is jeopardized by reason of the Council permitting a dense development. He expressed approval of the City's intention of creating a cul-de-sac at the end of Armshore Drive.

On the further cross-examination of Professor McAllister by counsel for the developer with respect to the density of the proposed development which appeared to be his major concern he agreed that the subject site if fully developed on an R-2 basis could have the same density as the proposed development.

Professor McAllister identified his property by marking his initials on the map filed as Exhibit E-5. His property is located on the north side of Armshore Drive and has a small frontage on the Northwest Arm. His property bears an L.R.I.S. number 250019. It is located at the point where Armshore Drive joins the Purcell's Cove Road. There are eight properties lying between the Edmonds Grounds and the McAllister property.

Counsel for the City pointed out to Professor McAllister that there had been 20 dwellings on the Edmonds Grounds which had been using Armshore Drive to access their properties and these properties are no longer in existence and the cul-de-sac proposed for Armshore Drive will cut off access to the Edmonds Grounds by way of that street.

Following the presentation of his evidence Professor McAllister summarized his evidence and made his argument in support of his contention that he had the status of an aggrieved person. Counsel for the City and the developer made submissions that Professor McAllister was not an aggrieved person.

The last witness to testify was Paul B. Huber, a Professor of Economics at Dalhousie University, who along with his wife resides in and owns the property known as No. 18 Armshore Drive. There are two parcels of land containing three dwellings separating his property from the Edmonds Grounds. His property has frontage on the Northwest Arm and is about 150 feet from the Edmonds Grounds site. He and his wife have lived at this address since November, 1975. Professor Huber regards his neighbourhood as an area including Horseshoe Island, Quinpool Road to the Rotary, up Fairmount Street to Chocolate Lake and the I.P.C. Store to Melville Cove. This is the area in which he walks his dog, walks to go swimming and jogs.

Professor Huber claims the status of an "aggrieved person". He addressed the question of what constitutes an aggrieved person. He was of the opinion that aggrieved is the act or sense of being aggrieved and arises out of the Council's decision in two ways, firstly from the way that the Council arrived at its decision and secondly from the substance of the Council's decision. He then referred to the purpose of the Planning Act as set out in Section 2 of that Act and in particular to clause (d) of Section 2 which states one purpose as being to "provide for the fair, reasonable and efficient administration of this Act, in order that sound development may be encouraged".

In the opinion of Professor Huber, key information relating to the proposed development which was given to the Council was deliberately distorted in favour of the developer. In that regard, he cited the method of calculating density which, he said, was not done on the basis of one person per habitable room as set out in the Land-Use By-law but by another method. Also he stated staff did not provide Council with traffic densities on the Purcell's Cove and Herring Cove Roads. In answer to a statement made by counsel for the developer that the City has the right to be wrong, he cited Section 45 of the Planning Act which, he states, prevents the Council from undertaking "any development within the scope of the planning strategy in any manner inconsistent or at variance therewith."

Professor Huber says he is aggrieved because the anticipated loss of amenities such as swimming and sailing on the Arm and the loss of some visual amenities. By the proposed infilling of the Arm he believes that sailing will be more difficult and this in turn will make the selling of his home more difficult and his property will be less valuable. He distinguished between the exchange value of his property and the use value and stated that the use value of his property will be significantly reduced.

With respect to traffic, Professor Huber pointed out that the City Staff Report of May 17, 1985, at page 6 states that the developer has also made provision for the extension of Armshore Drive to the development should it ever be desired. The staff report further stated at page 6 that "this may be done in the future, concurrent with the widening of the Herring Cove Road down to the rotary and the closure of the Herring Cove Road/Armshore Drive intersection". He pointed out that if this intersection is closed this would cause him extra travel time and therefore be a cost factor to him. He made some rough calculations of this possible cost factor to him based on his assumption that he would have to spend more time in travelling to and from his residence and would therefore have less time for other pursuits such as engaging in consulting work. On an annual basis he calculated this possible loss at $4,000.00 based on a $50.00 an hour rate.

In summary, Professor Huber argued that he is an aggrieved person because of the Council's decision which was made on the basis of distorted traffic information being given by staff. He also argued that the Council's decision, when implemented, would affect the integrity of his neighbourhood and the market value of his property would be adversely affected. He emphasized that it was not only the market value but also the use value of his property which would be affected.

Counsel for the developer submitted that Professor Huber had not demonstrated a legal grievance and therefore in law he is not an aggrieved person.

The determination of whether a nominal Appellant who files a Notice of Appeal under the provisions of the Planning Act is or is not an "aggrieved person" will depend on the facts adduced at the hearing of that particular appeal. The expression "aggrieved person" did not appear in the Planning Act of 1969 cited as S.N.S. 1969, Chapter 16 which was substantially in effect until June 1, 1983 and which made provision for an appeal in certain circumstances by an "interested person" to the Provincial Planning Appeal Board and since June 1, 1982 to the Municipal Board. The Provincial Planning Appeal Board gave a very wide meaning to the words "interested person" and Appellants were seldom seriously challenged on the basis that in law they did not have the status of an interested person.

The words "aggrieved person" first appeared in the 1983 Planning Act cited as S.N.S., 1983, Chapter 9 which came into effect on June 1, 1983. Under certain circumstances the right to appeal to this Board is provided to an "aggrieved person". The appeal presently under consideration was brought by persons claiming to be aggrieved persons pursuant to s.s. (1)(a) of Section 71 of the Planning Act. Other Sections of the Planning Act provide for an appeal to the Board in certain circumstances as for example Section 63(1)(a).

This Board has considered arguments relating to the status of Appellants as aggrieved persons in a number of cases including an appeal by Riverlake Residents' Association, the Douglas Benedict appeal and the appeal by H.A. Kaiser et al. In the Riverlake case the Board determined that the Appellant Riverlake Residents' Association was not an aggrieved person.

In the Douglas Benedict case the Board found the Appellant to be an aggrieved person and in the Edward Backman et al case the Board found that some of the Appellants were aggrieved persons and some were not.

The decision of this Board in the Riverlake case sets out the relevant case law to be applied in a determination by the Board as to whether or not a nominal appellant is an aggrieved person and is therefore entitled to a full hearing on the merits of his case. The Board does not intend to review in detail the legal authorities quoted in the Riverlake decision but does adopt the reasoning taken in that decision to determine what constitutes an "aggrieved person".

It is the Board's opinion that the Legislature in enacting the 1983 Planning Act which gives the privilege of appealing certain decisions to this Board by an "aggrieved person" rather than by an "interested person" clearly intended to restrict the category of persons who could appeal from the rather broad category of persons included within the expression "interested person". The Planning Act itself provides no guideline or definition as to the proper meaning to be applied to the words "aggrieved person". The Board is therefore obliged to interpret these words in the light of the facts of each particular appeal by applying the relevant case law to those facts.

The Board is of the opinion that the relevant case law is stated in a summary way by Coffin J.A. in speaking for the Appeal Division of the Supreme Court of Nova Scotia in

Halifax Atlantic Investments Ltd.; Lord Nelson Hotel Ltd.; Armdale Motel Ltd. v. City of Halifax, 28 N.S.R. (2d.) 193, when, after an extensive examination of the case law relating to the interpretation of the meaning of the words "aggrieved person", he concluded that "after a review of the authorities, it is my opinion that the facts must be within the reasoning of such cases as Ex Parte Sidebotham before a person can bring himself within the statutory meaning of a party aggrieved".

In Ex Parte Sidebotham [1880] C.D. 459 a bankrupt person was not granted standing under a statutory provision of the Bankruptcy Act granting a right to a person aggrieved by the trustee to apply to the Court. James, L.J. stated at page 465 of that case that "...the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." James, L.J. concludes his judgment by stating at page 466 that "...I am of opinion that the Appellant has suffered no grievance, he has hardly sustained even a damnum; if he has it is damnum absque injuria".

The expression "aggrieved person" is capable of a wide range of meaning if one merely applies the ordinary dictionary meaning to those words. The word "aggrieved" is defined in the Compact Edition of the Oxford English Dictionary as: "1.

opposed or hurt in spirit; distressed, troubled, annoyed, vexed; 2. injured or wronged in one's rights, relations, or position; injuriously affected by the action of anyone; having cause of grief or offence, having a grievance". If these definitions were applied to the evidence respecting those nominal Appellants who have testified in the appeal presently before the Board, most of them, if not all of them, would undoubtedly come within these definitions and would therefore achieve the status of "aggrieved persons" and therefore they would qualify, not simply as nominal Appellants, but Appellants entitled to be heard on the merits. This Board is of the opinion that it is obliged to interpret the words "aggrieved persons" not simply in the light of their ordinary dictionary meaning but in the light of the judicial interpretation given these words by Courts of competent jurisdiction and in particular the Appeal Division of the Supreme Court of Nova Scotia. Therefore the Board feels bound by the decision of that Court in the case of Halifax Atlantic Investments Ltd. et al v. City of Halifax referred to supra. Simply put the Board is of the opinion that a person to have the status of an "aggrieved person" under the provisions of the Planning Act, must have suffered a legal grievance, that is he must show something more than mere dissatisfaction with a decision he seeks to appeal. He must also be shown to have something more than a mere interest in the decision appealed. In order to have suffered a legal grievance a person must be able to prove that he has been denied some personal or property right or had imposed on him a burden or obligation.

In the Board's decision involving the appeal by Edward Backman et al from a decision of the Council of the City of Halifax approving a contract development proposal for property on South Bland Street, the Board determined that a number of Appellants who resided in and owned condominium properties adjacent to the site of the proposed development were aggrieved not simply because their properties abutted the development site but because the proposed development could reasonably be said to have an adverse or negative effect on these property owners causing an injurious effect on them. In that case the Board stated at page 46 that "...it is virtually impossible for the Board to determine in any given situation whether or not a person who appeals to the Board in the guise of an 'aggrieved person' from a decision of a Council approving a contract development is in fact and law an 'aggrieved person' unless the Board has before it adequate evidence relating to the proposed development to determine the effect of the development on the person appealing."

In the opinion of the Board after considering the evidence adduced, the arguments of Counsel and having perused the exhibits on file the Appellants, Mrs. Eva Huber, Mrs. Audrey Mercer, Mrs. Dorothy Read, Mr. Graham Read, the Northwest Arm Heritage Association, Ian McAllister and Paul B. Huber are not "aggrieved persons" within the meaning of that phrase as it appears in s.s. 71(1) of the Planning Act."

It is the opinion of the Board that there is an onus on the Appellants to prove that they are "aggrieved persons" and they have not discharged that onus. It is the Board's opinion that none of these above mentioned Appellants has demonstrated or proven that he or she has a legal grievance in relation to the Council's decision, nor have they been denied some personal or property rights or had imposed upon them a burden or obligation.

In coming to the conclusion it has the Board appreciates that all of the appellants who testified as to their standing genuinely perceived themselves to be aggrieved persons and each one for his or her own reasons considered himself or herself threatened in some respect by the proposed development.

The Board reiterates what was stated by the Board at page 46 of the Board's decision re the appeal by Edward Backman et al namely: "It appears to the Board that it is virtually impossible for the Board to determine in any given situation whether or not a person who appeals to the Board in the guise of an 'aggrieved' person' from a decision of a Council approving a contract development is in fact and law an 'aggrieved person' unless the Board has before it adequate evidence relating to the proposed development to determine the effect of the development on the person appealing". The Board is of the opinion that in this appeal it did have adequate evidence concerning the proposed development for this purpose.

The Board heard covincing evidence from three highly qualified and experienced accredited real estate appraisers which the Board accepts, that the proposed development approved by the City would have no adverse effect on the value of certain properties owned by those Appellants who gave evidence as to their status as aggrieved persons and whose properties are located in close proximity to the subject site. These persons and their addresses are as follows:

Eva M. Huber,	18 Armshore Drive,
Paul B. Huber,	18 Armshore Drive,
Audrey E. Mercer,	23 Purcell's Cove Road,
Dorothy B. Read,	5 Herring Cove Road,
Graham C. Read,	5 Herring Cove Road,
Ian McAllister,	4 Armshore Drive.

The Board while it understands and appreciates the concerns expressed by these Appellants is satisfied that they have not suffered a legal grievance and are therefore not aggrieved persons within the meaning of those words that have been judicially defined.

A great deal of emphasis was placed by the Appellants who gave evidence that the development of the subject site in accordance with the development contract would result in an increase in traffic to and from the site. Undoubtedly, there will be an increase in traffic both on the Purcell's Cove Road and the Herring Cove Road as well as on the Armdale Rotary. The evidence before the Board is that the traffic on these two roads and on the Rotary is already very heavy and the additional traffic generated by the development of the Edmonds Grounds site would only have a nominal effect. In any case the expert opinion evidence of the appraisers is that this additional traffic will not cause a devaluation of the properties of the Appellants who testified or whose properties are referred to in the reports prepared by the appraisers.

Much emphasis was placed by some Appellants on the density of the proposed development. While it is a fact that the density of the project when completed will exceed the density of the lands in the neighbourhood of the subject site, it will not exceed the allowable maximum density as of right under the present R-2 zoning of the subject site. In terms of density since the Appellants could reasonably expect the subject property to be developed on an as-of-right basis to a maximum density of 45 persons per acre, it is difficult to conclude that they would be injured or adversely affected by a development which will have a density less than 45 persons per acre.

With respect to the Northwest Arm Heritage Association it is the Board's opinion that this body is not an "aggrieved person". Although its objects as set out in its Memorandum of Association (Exhibit E-6) are broadly stated with respect to preserving and enhancing "the natural character of the Northwest Arm and environs and to protect the amenity of the Northwest Arm in order that it may be enjoyed by future generations" it does not own real property which might be affected by the proposed development. Furthermore, as was stated by the Board in its decision respecting the proposed South Bland Street development, it has "not been denied some personal or property right or had imposed upon it a burden or obligation and thus has not suffered a legal grievance". It has however demonstrated to the Board that it has a sufficient and substantial interest in the proceedings to be permitted to participate in the hearing pursuant to s.s.(4) of Section 27 of the Municipal Board Act.

With respect to those nominal Appellants who signed one of the Notices of Appeal but who did not give evidence as to their status as aggrieved persons the Board is obliged to assume that they are not "aggrieved persons" as the onus is on the Appellants to prove that they are aggrieved.

In the result the appeal is dismissed for lack of jurisdiction since no one Appellant has proved that he or she is an aggrieved person.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of January, A.D., 1986.

R.H. BLOIS, Chairman.

Darryl W. Wilson

DARRYL W. WILSON, Member.

RICHARD L. WELDON, Member.

Backman et al. v. City of Halifax

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT EIGHT STOREY, 70-UNIT APARTMENT/COMMERCIAL BUILDING--AGGRIEVED PERSONS--CONSISTENCY WITH M.P.S.--MUNICIPAL BOARD ACT, S. 27--PLANNING ACT, SS. 40, 63, 71--CITY OF HALIFAX M.P.S., SECTION 2, POLICIES 1.1.1, 1.2, 1.6, 1.7; SECTION 5, POLICIES 1.1, 1.1.2, 7.8.2, 7.8.2.2

This is an appeal pursuant to two Notices of Appeal by persons claiming to be "aggrieved persons" against a decision by the Council of the City of Halifax approving an application for contract development to construct an eight storey, 70-unit apartment/commercial building on South Bland St. in the south end of Halifax. The subject property is zoned Industrial (C-3), contains about 33,261 sq. ft., has 201.8 ft. street frontage and has an existing building containing offices and a warehouse. South of the property the land use is commercial and to the east land is occupied by Ace Towing. The west side of the street is mainly single family dwellings, although the Halifax Curling Club is in the middle of the block. There is also a Tourist Home and a Church and Day Care Centre to the west. The land to the north is zoned R-3 (Multiple Dwelling Zone). The subject area is within the South End Area of the City's Municipal Planning Strategy (M.P.S.).

HELD: The Board has jurisdiction to hear the appeal on the merits. The appeal is allowed and the application for contract development is rejected.

Counsel for the developer objected that not all of the Appellants are "aggrieved persons." If any one of the Appellants is an "aggrieved person," then the Board will have jurisdiction to determine the merits of the appeal; if none are "aggrieved persons" then the Board must dismiss the appeals for lack of jurisdiction. All of the Appellants who own property and reside in Bishop's Row, a condominium residential complex immediately north of and adjacent to the subject property, qualify as aggrieved persons, as was acknowledged by the developer and the City. An "aggrieved person" under the Planning Act must have a legal grievance, that is he must have a lawful complaint or injury. This is one sanctioned or recognized by law. He must show something more than mere dissatisfaction. It is virtually impossible to determine if a person is an "aggrieved person" unless the Board has before it adequate evidence relating to the proposed development to determine the effect of the development on the person appealing. Here the proposed development will devalue the properties in the Bishop's Row condominium and will compound existing parking difficulties. The Ward One Residents' Association is not an aggrieved person as it is not the owner of property which could be affected and has not been denied a right or had imposed upon it a burden or obligation. It is doubtful that others are aggrieved because their properties are sufficiently remote as not to be adversely affected. Those not qualifying as aggrieved persons have demonstrated a sufficient real and substantial interest so as to be permitted to participate in the hearing.

The proposed development is not allowable under the "as of right" provisions of the Land-Use By-law. The sole issue then is whether Council's decision can reasonably be said to be consistent with the intent of the City's M.P.S. The proposed development must meet the mandatory guidelines which Council is obliged to consider by virtue of Policy 7.8.2.2 as well as generally meet the intent of the M.P.S. Residential development may be permitted on this site but the scale and intensity of use is too great to maintain the integrity of the "Industrial" designation. The proposed development does not meet the intent of the guideline set out in Policy 7.8.2.2 that residential development be limited in height to 50 ft. or six storeys. Even if new industrial development were proposed for the subject site, Policy 7.8.2 would apply and limit height to 35 ft. or three storeys. The proposal also does not meet the intent of Policy 1.1.1 in that it contains an excessive amount of commercial space and is too high in comparison to the two and three storey residential properties in the neighbourhood. The decision cannot reasonably be said to be consistent with the intent of the City's M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c. 9;

- and -

IN THE MATTER OF: An Appeal by **EDWARD BACKMAN, JOAN BACKMAN, MICHAEL DUDA, H.A. KAISER, BETH POULOS, ANNE DERRICK, MARGARET WHITE** and **BRIAN WHITE** from the decision of the Council of the City of Halifax made on March 28, 1985 approving an application for contract development by **SOUTHWEST APARTMENTS LTD.** to construct an apartment/commercial building at 961 South Bland Street in the City of Halifax;

- and -

IN THE MATTER OF: An Appeal by the **WARD ONE RESIDENTS' ASSOCIATION** and **DONALD HIGGINS** from the above-mentioned decision of the Council of the City of Halifax.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH SALTON, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: PROFESSOR H.A. KAISER, LL.B., appeared on behalf of the Appellants Edward Backman et al;

BARBARA MEALIEA, appeared on behalf of the Ward One Residents' Association;

DONALD HIGGINS, appeared on his own behalf;

PETER J.E. McDONOUGH, Q.C., and SCOTT C. NORTON, LL.B., on behalf of the developer, SOUTHWEST APARTMENTS LTD.;

WAYNE ANSTEY, Q.C., for the City of HALIFAX.

DECISION

This hearing arose out of two separate Notices of

Appeal filed under the provisions of s.s. (1)(a) of Section 71 of the Planning Act, S.N.S. 1983, c. 9, by persons claiming to be "aggrieved persons". Both Notices relate to a decision by the Council of the City of Halifax made on March 28, 1985, which approved an application for contract development by **SOUTHWEST APARTMENTS LTD.** to construct an eight storey, 70-unit apartment/commercial building on lands known as Civic No. 961 South Bland Street located in Ward 1 in the south end of the City of Halifax.

The first Notice of Appeal is dated April 26, 1985, and was filed with the Board on the same date. It is marked Exhibit A-1. The eight signatories to this Notice of Appeal are:

EDWARD BACKMAN,
JOAN BACKMAN,
MICHAEL DUDA,
H. ARCHIBALD KAISER,
BETH POULOS,
ANNE DERRICK,
MARGARET WHITE
BRIAN WHITE

The second Notice of Appeal is dated April 29, 1985, and was filed with the Board the same date. It is marked Exhibit A-2. This Notice of Appeal is from:

WARD ONE RESIDENTS' ASSOCIATION, and
DONALD HIGGINS.

It was signed by **BARBARA MEALIEA,** the Chairman of the Board of Directors of the Ward One Residents' Association and by **DONALD HIGGINS.**

The Board is satisfied that both Notices of Appeal were filed with the Board within the 21-day appeal period set out in s.s. (2) of Section 71 of the Planning Act.

Since both appeals relate to the same decision of the Council of the City of Halifax, the Board agreed to hear both appeals at the same time. The Board arranged for publication of the Notice of Hearing in a Halifax daily newspaper by three insertions which appeared on July 2nd, 9th and 16th, 1985. The hearing was held in the hearing room of the Expropriations Compensation Board Room on July 22nd, 23rd and 24th, 1985.

At the commencement of the hearing, Professor Kaiser tendered an Affidavit (Exhibit A-3) relating to the service of the Notice of Hearing on the assessed owners of lands within 500' of the subject site and upon certain persons designated by the Board to receive a copy of the Notice. The Board is satisfied that the hearing was properly advertised and the required Notices of Hearing had been mailed to those persons designated by the Board as persons entitled to receive Notice.

Mr. McDonough indicated that he was not prepared to agree that all of the Appellants are aggrieved persons pursuant to s.s. (1), Clause (a) of Section 71 of the Planning Act. He did, however, state that those Appellants who reside in Bishop Row are aggrieved persons and "subject to what they have to say I am prepared to accept that they are aggrieved persons and thereby the appeal can go ahead."

The Board, after hearing brief opening statements by the parties, proceeded to hear the appeals on the merits on the understanding that evidence would also be led by the Appellants as to their status as aggrieved persons and the Board would then determine the standing of the Appellants and render one decision dealing with the standing of the Appellants and with the merits of the appeals.

Professor Kaiser in his opening statement indicated that he would be calling evidence to show that the decision approved by the City Council was not within the intent of the City's Municipal Planning Strategy (M.P.S.).

Mr. McDonough in his opening remarks stated that he would be adducing evidence to show that the Council's decision was within the intent of the City's M.P.S.

The Notice of Appeal dated April 26, 1985, signed by Edward Backman et al and filed as Exhibit A-1 states the following grounds for appeal, viz:

> (1) The decision of the Council cannot reasonably be said to carry out the intent of the municipal planning strategy and is inconsistent with the intent of the municipal planning strategy, with reference to the following particulars, which list is not exhaustive of the said infringements and inconsistencies:
>
> (A) The decision is inconsistent with Policy 7.8.2.2. of Part II, Section V of the Municipal Planning Strategy (Municipal Development Plans for the City of Halifax, hereafter the M.P.S.), in that the height of the proposed building exceeds 50 feet or six storeys and the proposed building would be inadequately buffered from adjacent industrial uses;
>
> (B) The decision is inconsistent with Section 44(A) of the Land Use Bylaw of the City of Halifax, in that the proposed development fails to meet the criteria established by the said section to permit any commercial use of the premises, in that the structure would contain less than 100 units and have no separate access for the commercial facilities;
>
> (C) The decision is inconsistent with

Section 47(3) of the Land Use Bylaw, in that the planned structure does not meet the angular planes, intended to control the size of buildings;

(D) The decision is inconsistent with Section 48(1) of the Land Use Bylaw, in that the proposed structure exceeds the population density limits therein prescribed;

(E) The decision is inconsistent with Policy 1.1.1 of Part II, Section II of the M.P.S. in that the proposed structure is incompatible with the existing neighbourhood;

(F) The decision is inconsistent with Policy 1.3 of Part II, Section V of the M.P.S. in that that proposed building contains less than 40% family housing accommodation;

(G) The decision is inconsistent with Policy 1.6 of Part II, Section II of the M.P.S., in that the proposed building is out of scale, with respect to the existing neighbourhood and the use of the land is incompatible with the existing neighbourhood;

(H) The decision is inconsistent with Policy 1.7 of Part II, Section II, of the M.P.S., in that the development would amount to a large and socially unjustifiable neighbourhood dislocation, and that the proposed changes to the neighbourhood are unacceptable to the residents;

(I) The decision is inconsistent with Policy 5.1 of Part II, Section II of the M.P.S. in that the proposed development is not a suitable re-use of land in an area of many Heritage structures, streetscapes, sites, and/or conditions;

(J) The decision is inconsistent with Policy 7.2 of Part II, Section II of the M.P.S. in that it does not take into account the social, physical, economic and aesthetic effects on the natural and man-made environment;

(K) The decision is inconsistent with Policy 9.2 of Part II, Section II of the M.P.S. in that it does not take into account sewer and water problems which may be created by the proposed structure and others which may follow, should a precedent be set by this permit being given;

(L) The decision is inconsistent with Policy 1.1.1 of Part II, Section V of the M.P.S. in that it would permit infill housing inappropriate to the characteristics of the neighbourhood;

(M) The decision is inconsistent with the Policy objectives of Part II, Section V, subsection 2 of the M.P.S., in that the proposed development would permit commercial uses not serving the needs of the area and incompatible with the needs of the city.

(2) The decision to permit this contract development would cause the Appellants undue hardship, and extraordinary and compelling circumstances are present.

(3) Further and other grounds of Appeal may be presented prior to the hearing of this Appeal."

The Notice of Appeal dated April 29, 1985, signed by Barbara Mealiea on behalf of the Ward One Residents' Association and by Donald Higgins on his own behalf and filed as Exhibit A-2 lists the following grounds of appeal, viz:

> "The grounds for this appeal are that the decision of Halifax City Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy with particular reference to the following:
>
> a) the height of the approved building exceeds 50 feet or six storeys, contrary to Policy 7.8.2.2. of Part II, Section V of the Municipal Planning Strategy;
>
> b) the density of the approved building exceeds the population density limits prescribed in Section 48(1) of the Land Use Bylaw;
>
> c) the angular planes of the approved building are inconsistent with Section 47(3) of the Land Use Bylaw;
>
> d) the component for commercial uses in the approved building is inconsistent with Section 44(A) of the Land Use Bylaw, in that the building would contain less than

> 100 residential units and would have no separate access for the commercial facilities; and
>
> e) construction of the approved building would constitute a large and socially disruptive intrusion in the neighbourhood, thus being inconsistent with Policies 1.6 and 1.7 of Part II, Section II of the Municipal Planning Strategy.
>
> Further grounds of appeal may be presented prior to the hearing of this Appeal."

The subject property known as Civic No. 961 South Bland Street is situate on the east side of the street between Inglis Street on the north and Atlantic Street on the south. It is zoned Industrial (C-3) Zone. The property lies within an area of land referred to in the M.P.S. as the "South End Area" which extends from the Northwest Arm on the west to the Harbour on the east. This area is fully described in Section V of the M.P.S. The subject lot has a frontage on South Bland Street of 201.8 feet and contains about 33,261 sq. ft. according to a Staff Report dated January 15, 1985 (Item No. 1 of Exhibit A-4). There is an existing building on the lot containing offices and a warehouse. This building is to be demolished if the development approved by the City is constructed.

South of the subject property the land use is commercial. East of the subject property is land occupied by the Ace Towing Company on which motor vehicles are stored. The west side of South Bland Street is mainly occupied by single family dwellings. Also on the west side of the street there is the Halifax Curling Club located in the middle of the block. At the southwest corner of South Bland Street and Inglis Street is a Tourist

Home and the land adjacent to it on the west is occupied by a Church and Day Care Centre. Immediately south of the subject site is a property used for commercial purposes and beyond that to the southeast is a large grain elevator.

The sole planning issue in these appeals is whether the Council's decision in approving the proposed development, which would not be allowable under the "as of right" provisions of the Land-Use By-law, can reasonably be said to be consistent with the intent of the City's Municipal Planning Strategy (M.P.S.).

The first witness called was Brian J. White, one of the Appellants. He and his wife, Margaret, are resident owners of a condominium unit located at Civic No. 5480 Inglis Street being part of a residential redevelopment known as Bishop's Row, consisting of sixteen units created from the restoration and renovation of a group of Victorian period homes. He has resided at this address for three years and values his property in the $92,000.00 to $95,000.00 range. Bishop's Row is located on the corner formed by the south side of Inglis Street and the east side of South Bland Street. It is adjacent to and immediately north of the subject property.

Mr. White testified that he chose the Bishop's Row location as a residence because of his desire to reside near the downtown area of the City. He considered that one of the biggest charms of Halifax is its renovated older style homes.

Mr. White expressed his concern about the proposed development consisting of an 8-storey, 70-unit apartment building with underground parking and having commercial space on the first floor. He objected to the height of the proposed building which would "look down" on his building which is a three-storey building. He expressed concern that existing parking problems would be greater. He also was concerned about possible noise and wind factors which might result from the proposed development. He thought the proposed development was too massive for the area. Also, he was concerned about the possible devaluation of his own property and the possibility of other apartment buildings being constructed in this area.

Mr. White stated that the City's M.P.S. provided him with a measure of protection. He was aware that the subject property is presently zoned light industrial but his preference is to see the property developed for residential purposes, either low-rise buildings or town houses.

Mr. White identified a series of 22 photos taken by him, mostly in April of 1985 but some in July of 1985. The photos show the Bishop's Row condominium in which Mr. White resides and cover South Bland Street from various positions showing the subject property and the grain elevator located at the south end of South Bland Street in close proximity to the subject property. The photos also show automobiles parked on the west side of South Bland Street on the evening of April 12, 1985.

On cross-examination Mr. White agreed that there are a number of commercial buildings on Inglis Street including a Gulf service station located at the corner of Inglis and

Mitchell Streets, a short distance east of the Bishop's Row property. He also agreed that the Ace Towing Company operated a site on the west side of Mitchell Street where automobiles were in open storage. The Ace Towing site is adjacent to and east of the subject site. Mr. White indicated that he would prefer a westward expansion of the Ace Towing Company's business onto the subject site over a residential high-rise building. Further on cross-examination he agreed that the Southpoint Apartments consisting of 10 to 11 storeys is located at 5415 Victoria Road which is in close proximity to the Bishop's Row property. He stated that he would be agreeable to a six-storey apartment building for the subject site. On re-examination Mr. White stated that there was no provision for parking respecting the proposed commercial elements for the subject site.

In answer to a question from a member of the Board Mr. White could not say whether the construction of the proposed development would devalue his property.

The next witness called by Mr. Kaiser was Parker Edward Backman who resides at Apartment No. 1, of the Bishop's Row condominium at 5480 Inglis Street. He and his Wife and daughter have resided there for the past fifteen months. He stated that his property has a market value of $130,000.00 and while his neighbourhood is a little noisy he is satisfied with it as it exists. He stated that before purchasing his property he checked at City hall to ascertain what could be built on the subject site which he knew was zoned light industrial. He thought he had protection from unwanted development by virtue of the City's M.P.S. His major concern was not the height of the proposed building but the density. Also he considered that there were inadequate parking facilities for the proposed development. He prefers to see the subject site developed for residential purposes and stated when he purchased his property he was told by City Staff that he could expect the subject site to be developed residentially.

Mr. Backman stated that the proposed development is unacceptable to him because the density would be too great.

On cross-examination Mr. Backman agreed that the Bishop's Row property does not have any provision for visitor parking.

Mr. Backman testified that in his opinion the proposed development would cause his property to be devalued.

When on cross-examination Mr. Backman was asked if he would prefer to have the subject property used as an extension of the Ace Towing business, he replied that the towing company's business would not affect his property as much as the proposed 8-storey apartment building.

The high density use of the subject site and the increased traffic in the area which would result from the proposed use of the site appeared to be Mr. Backman's main concerns.

The next witness called by Professor Kaiser was Michael T. Duda, one of the Appellants. Mr. Duda is employed as an economist with the Nova Scotia Government and is the owner of a condominium unit in which he resides and which forms part of Bishop's Row, located at No. 985 South Bland Street.

His unit is within a building immediately north of the subject site. This building is separate from the main condominium building located on the south side of Inglis Street. He testified that he resides in a quiet established neighbourhood close to amenities and his place of work. He enjoys a relaxed life style in this area where his friends reside.

Mr. Duda expressed concern about the density of the proposed development also about the height of the building and the anticipated increase in traffic. When he purchased his property the site in question was occupied by an empty warehouse. He expressed the view that the construction of the proposed development would change the character of his neighbourhood. He indicated that had he anticipated that the subject site would be developed in the manner approved by the City Council he would not have offered as much for his property. He stated that the protection of his neighbourhood was important to him and he thought the City's M.P.S. offered him some measure of protection. If the proposed development fell within the guidelines of the M.P.S. he would not object. He favours a residential use for the subject site.

On cross-examination, Mr. Duda was asked to describe the character of the area in which he resides. He replied that the area was family oriented, quiet and well established. It was pointed out to Mr. Duda that within a 500' radius of the subject site there was a grain elevator, two service stations, the Halifax Curling Club, Duron Enterprises, White Cross Surgical Supplies, Nova Scotia Liquor Commission warehouse, Foulis Engineering, a grocery store, the Resolute Club, Schooner Books, a submarine store, Peter's Pizzeria, Top Cuts and an oriental restaurant. Mr. Duda conceded that the area contains a mixture of uses but he considered that it is predominantly residential with some commercial and industrial uses.

On cross-examination, Mr. Duda was asked to give evidence of a conspiracy to circumvent density limitations on the part of the City's staff which was alleged by Mr. Duda in a written brief he submitted to the City Council. A copy of this brief was filed as Item No. 15 in Exhibit A-4. Mr. Duda replied that this was his view but he was not prepared to state under oath anything further about the alleged conspiracy.

The density of the proposed development appeared to be Mr. Duda's main concern.

Evidence was given by Anne Derrick, a Barrister by profession and one of the Appellants, who has resided since May of 1981 at 5543 Atlantic Street, which is about 1½ blocks from the subject site. She stated that she is a joint tenant owner of the property in which she resides and which has a value of $170,000.00. Her objections to the proposed development are that it violates the M.P.S. and is too high, too dense and has inadequate provisions for parking. She expressed the opinion that the commercial element in the proposed development violates the M.P.S. She considered that allowing the subject development would be the "thin edge of the wedge" and would result in an increase in population and therefore an increase in traffic. In her view, the proposed development is ugly and unimaginative.

On cross-examination, Ms. Derrick agreed that a six storey apartment building for the subject site would be within the M.P.S. She considers that the proposed commercial element is an unlawful and unnecessary use. Also she indicated that in her view, there was no need for the proposed commercial space. Counsel for the developer indicated to Ms. Derrick that the developer "as of right" could construct a greater amount of commercial space than is proposed. Ms. Derrick also agreed on cross-examination that there is a need for residential rental accommodation in the City. Ms. Derrick would not be opposed to a six-storey apartment building but is opposed to an eight-storey one.

Evidence was given by Dr. Carmen Cousins, a resident of 1074 Wellington Street in the City of Halifax. He is the president of the Halifax Curling Club which has a membership of over 300 and is located on the west side of South Bland Street in close proximity to the subject site. He stated that the clubhouse has been there since 1902. He has been involved in the planning process in the south end of the City and was aware of the proposed development. He indicated that the Club is opposed to the development in question because of the existing traffic and parking problems in the area. He stated that on-street parking is restricted to one side of South Bland Street. The Club presently enjoys without charge the use of a lot of land on the subject site for the parking of members' motor vehicles.

Dr. Cousins stated that the proposed building will cover the entire lot area and will not be in keeping with the existing low rise buildings on the street. He stated that the curling club provides 30 parking spaces on its own site for its members. He is opposed to any development for the subject site which would interfere with the Club's parking privileges on the subject site.

On cross-examination, Dr. Cousins stated that it was the Club's executive which made the decision on behalf of the Club to oppose the development in question. There are 14 members on the Club's Executive. In response to a question from a member of the Board, Dr. Cousins said that he considered the subject site was in a primarily residential area.

Donald Higgins, one of the Appellants and a resident owner of property known as 5672 Rhuland Street next gave evidence. He is a professor at St. mary's University and is Vice-Chairman of the Nova Scotia Branch of the Community Planning Association. He is also a member of the Board of Directors of the Ward One Residents' Association and Chairman of its planning committee. He purchased his property on Rhuland Street in August of 1978. Rhuland Street is a short street lying between South Park Street on the west and Lucknow Street on the east. It is parallel to Inglis Street and is three blocks from South Bland Street.

Professor Higgins stated that Rhuland Street lies within a fragile area. Across the street from his residence is a 9-storey apartment building with no commercial space in it. He indicated that because of his close proximity to the apartment building across the street he experiences parking problems, noise problems and has to contend with litter and broken glass. On the west side of South Park Street directly opposite the west end of Rhuland Street is a large apartment building known as Somerset Place containing 154 apartment units with some commercial space. Also there is an 8-storey, 56 unit apartment building on Lucknow Street which has no commercial space. He stated that the Neighbourhood Improvement Program (N.I.P.) and the Detailed Area Planning (D.A.P.) process were crucial in his decision to purchase the Rhuland Street property.

Next door to the Higgins property is a 3-storey building (5680 Rhuland Street) containing 14 condominium units. Professor Higgins values his property consisting of a dwelling house and land at $250,000.00 and is concerned that his investment in the Rhuland Street property would be adversely affected by a change in the D.A.P. He marked the location of his property on the map filed as Exhibit A-8. His property is just outside the 500' radius circle from the subject site. Professor Higgins was of the opinion that the proposed development will have a negative impact on parking in the area. He was also concerned about the fact that the height of the development would be two stories more than the as-of-right allowable height.

On cross-examination, Professor Higgins admitted that the three apartment buildings in his neighbourhood had been there when he purchased his property. He stated his assessment was $124,000.00 but he considers his property to be worth $250,000.00.

In the opinion of Professor Higgins, every person in the south end of the City is an "aggrieved person" with respect to the development in question. He expressed the opinion that the proposed development would have some detrimental effect on his property but he did not quantify the amount.

Professor Higgins stated that it was important to him that the City should maintain the integrity of its development plan (M.P.S.).

Ms. Barbara Mealiea, who acted as spokesperson for the Ward One Residents' Association, called Ivor R. Harrington as a witness. Mr. Harrington is an employee of the Province of Nova Scotia and resides at No. 5170 Morris Street in the City of Halifax. He is the Vice-Chairman of the Ward One Residents' Association which was formed in 1974. He identified the Memorandum of Association of the organization filed as Exhibit A-11. Section 2 of the Memorandum sets out the objectives of the society which include the following:

> "a) To promote and protect the best interests of the residents of Ward One.
>
> b) To provide a vehicle for liason between residents of Ward One and elected officials, their appointees, other bodies and individuals.
>
> d) Areas of interest may include community planning, health, housing...".

Any person who resides in Ward One in the City of Halifax and who pays the Annual Membership fee shall be a member of the Association (Section 4A).

Mr. Harrington stated that the filing of an appeal by the Ward One Residents' Association had been authorized at a meeting of the Society's Board of Directors held on April

18, 1985. A copy of the Minutes of that meeting were filed as item No. 13 of Exhibit A-14.

The Ward One Residents' Association presented a brief at the Public Hearing held by the City in connection with the developer's application for approval of the proposed development.

A copy of this brief is contained in Exhibit A-4 as Item No. 9. The brief recommended that the Council refuse the application for contract development based on three concerns, namely:

1. that the proposed 8-storey, 70-unit building does not meet the height requirement or the angle controls of the South End Detailed Area Plan.
2. that the development will have an adverse effect on property values; and
3. that approval of the proposed development will be a precedent for other possible developments on South Bland Street.

Mr. Harrington made reference to the Board's decision in the Riverlake Residents Association appeal (Exhibit A-16) and submited that his association is an aggrieved person.

With regards to the question as to whether or not the proposed development meets the intent of the M.P.S., Mr. Harrington referred to the City Wide Objectives and Policies of the City's M.P.S. set forth in Section II of the M.P.S. In particular he referred to Policies 1.6 and 1.7 which read as follows:

> "1.6 The development of vacant land, or of land no longer used for industrial

> or institutional purposes within existing residential neighbourhoods shall be at a scale and for uses compatible with these neighbourhoods in accordance with this Plan, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.
>
> 1.7 The City should permit the redevelopment of portions of existing neighbourhoods only at a scale compatible with those neighbourhoods. The City should attempt to preclude massive redevelopment of neighbourhood housing stock and dislocations of residents by encouraging infill housing and rehabilitation. The City should prevent large and socially unjustifiable neighbourhood dislocations and should ensure change processes that are manageable and acceptable to the residents. The intent of this policy, including the manageability and acceptability of change processes, shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

Mr. Harrington expressed the opinion that the scale of the proposed development is not compatible with the scale of the existing housing stock in the subject neighbourhood.

Mr. Harrington pointed out that under the City's Land-Use By-law, the R-3 Zone (Third-Density Residential) makes provision for apartment house uses and Section 48 of the Land-Use By-law states that the population density of a building erected under the R-3 zone requirements must not exceed 125 persons per acre if located in an area other than that described in Schedule "A". The subject site is in fact located outside the area described in Schedule "A". He also pointed out that under the provisions of Section 44A of the Land-Use By-law those commercial uses permitted under Section 59A(1) (with some exceptions) are permissible in an apartment house located in the "South End" which contains 100 or more self-contained dwelling units. He then pointed out that the proposed development would have 70 dwelling units so that if the subject property were zoned R-3 instead of C-3, the proposed ground floor commercial area would not be a permissible use.

Finally, Mr. Harrington referred to Sections 62A and 62B of the Land-use By-law under the heading C-3 Zone (Industrial Zone). Section 62A provides that in the "South End" area of the City permitted uses include any industrial use "except where the operation of same would cause a nuisance or hazard to the adjacent residential uses....". Section 62B of the Land-Use By-law provides for certain set-back requirements for C-3 uses in the "South End" where these uses are located adjacent to a residential Zone.

Mr. Harrington pointed out that the proposed development being 8 storeys high exceeds the guidelines set out in Policy 7.8.2.2. of Section V of the M.P.S. relating to the South End Area Plan. Policy 7.8.2.2. reads as follows:

> "7.8.2.2.
>
> Pursuant to Policy 7.8.2 above, the City may consider applications for residential development where the proposed location is adjacent to existing residential uses under the provisions of Section 33(2)(b), and in so doing the City shall consider as guidelines:
>
> i) that the height of the proposed development is limited to 50 feet or six storeys;
>
> ii) that family-type accommodation shall not be a requirement for unit mix in such development; and
>
> iii) that there be adequate buffering from industrial uses which may

> adjoin the property on which the
> development is proposed."

On cross-examination, Mr. Harrington stated that he resides on Morris Street in the City of Halifax and Mrs. Mealiea resides in Belmont on the Arm. The Board notes that neither of these places of residence could reasonably be said to be in the same neighbourhood as the subject site. Mr. Harrington stated that the purpose of tendering Exhibit A-13 (Notice of Hearing of an appeal by the Ward One Residents' Association of a planning decision made in 1981) was to show that this organization had previously appealed.

Further on cross-examination, Mr. Harrington acknowledged that the Ward One Residents' Association did not own any land. He stated he was concerned over the fact that there was a commercial element in the proposed development which he thought flies in the face of the guidelines set out in the M.P.S.

Expert opinion evidence was given by Robert W. Robertson, a Planner II employed by the City of Halifax, who appeared under subpoena. Mr. Robertson has been employed as a planner by the City for 6 years. He is familiar with the proposed development in question. He stated there had been two applications filed by the developer respecting the subject property. The first one was in February of 1984 and after having gone through the contract development process, had been refused by the City Council. This application related to a proposed development of 10 storeys, two of which were to be commercial space. It was to accommodate 86 residential units. Staff had recommended rejection of this application. He identified Exhibit H-19 as a report by the City's P.A.C. to the Council recommending that the Application be refused on the basis that the development was not permitted under the M.P.S. Two staff reports dated May 17, 1984, and July 9, 1984, are attached to the P.A.C. Report. The staff report dated May 17, 1984, recommended refusal of the application "because the application does not meet Policy 7.8.2.2 of the M.P.S...". The staff report of May 17, 1984, stated in part that the proposal is not consistent with the height limitation set out in the M.P.S. He stated that the Council followed the staff recommendation and refused the first application on August 30, 1984.

Mr. Robertson then referred to a second application made in October of 1984 respecting a modification of the original proposal whereby the overall height of the building was reduced and the number of units was reduced from 86 to 76 and the area of commercial space was reduced.

Mr. Robertson referred to a memorandum (Exhibit A-20) dated November 6, 1984, he had sent to Gary Fleming of the City's Development Control section regarding the revised application by the developer. The following is an extract from Mr. Robertson's memorandum:

> "As you are aware, this property is designated as 'Industrial' and zoned as C-3 (Industrial) within a thirty-five foot height precinct. The applicant proposes an eight storey apartment building by contract agreement pursuant to Policy 7.8.2.2 of the South End Area Plan.
>
> The details of the proposal may be summarized as follows:
>
> (1) Proposed Uses - Residential 76 units

Commercial - (approx) 3,100 square feet

(2) Density - 168.4 persons per acre

(3) Height - 74 feet or eight storeys approximately

(4) Lot Frontage - 201 feet

(5) Lot Area - 39,315 square feet (.90254 acres).

PLAN POLICY

A detailed discussion of the policy parameters within which development by agreement is permissible for this site is contained in a staff report to the PAC dated July 9, 1984 dealing with a proposed ten storey residential/commercial project. In general, the policy discussion in the July 9, 1984 report remains operative and the question is one of testing this revised proposal against the policy thrust of the Plan.

The main points to be considered are as follows:

- The area is designated Industrial; thus the Industrial policy set of the Plan is to be used in assessing the relative merits of this project. Essentially, the future intent of the City with respect to land use on this site - based on the South End Plan - is to encourage industrial development. The rationale for this type of development intent is spelled out in the report of July 9, 1984.

- However, in addition to the 'Industrial' designation and zoning, residential development may be permitted in certain specified locations within guidelines established in the Plan (Policy 7.8.2.2). These guidelines, although they are flexible to some extent, are aimed at the following:

  (a) providing some flexibility in respect to the use of land designated Industrial 'adjacent to residential areas'.

  (b) providing some flexibility - by contract - in respect to the requirements of the Land-Use By-law. The actual details of a contract must be assessed against the 'Industrial' policy set and

> to some extent the 'Residential Environments' policy set.
>
> In general terms, residential development may be permitted on this site provided that the scale and intensity of use is restricted so as to maintain the integrity of the 'Industrial' designation in respect to the intent of the Plan; and, to ensure that a development is in character with adjacent residential neighbourhoods pursuant to the 'Residential Environments' Policy Set.
>
> The guidelines contained in Policy 7.8.2.2 are intended to provide the quantitative measure(s) against which a development is to be tested. In my view, an eight-storey residential development of approximately 75 feet does not meet the policy intent of the 'Industrial' designation (see the July 9 report for a detailed discussion of this point). Further, I would argue that the proposed development contravenes the thrust of the 'Residential Environment' set concerning compatability, notably Policy 7.8.2.2 regarding six storeys or 50 feet. Primarily as a result of the height of this proposal, the development exceeds the density requirements of the Land-Use By-law and infringes on the angle controls. In my view, these deficiencies are substantial in respect to this development based on the policy guidance of the South End Plan.
>
> Based on the foregoing, I would recommend that this application be refused. However, we would be prepared to recommend approval of a six-storey/50 foot residential project for this site. The staff report to Council should note this latter point."

Mr. Robertson referred to a Staff report dated January 15, 1985, filed as Item No. 1 of Exhibit A-4. He had some input into its priorities. This report, after reviewing the second application for contract development respecting a proposed 8-storey building with underground parking and commercial space on the first floor, recommended that the application be refused. The staff report of January 15, 1985, reads in part as follows:

> "MUNICIPAL PLANNING STRATEGY (MPS)
>
> The City-wide residential policies (Policies 1.1.1 and 1.1.3) support residential

development on the Peninsula through infill. Policy 1.6 permits the use of industrial land for residential purposes. Policy 1.3 encourages family-type housing in the south end. Thirty-nine percent of the units in this building are two-bedroom and are therefore considered family accommodation. The above policies are attached as Appendix A. Generally therefore, a residential development at this location is encouraged by the MPS. In particular, it will help to form a buffer between the residential uses to the north and west, and the industrial uses to the south and east. This will contribute to stabilization of the residential areas.

While a residential use is in accordance with the general policies of the MPS, there are specific policies for industrial designated areas in the South End. Basically, these policies encourage industrial development. However, residential uses can be considered by contract by City Council on lands designated and zoned industrial where the proposed location is adjacent to existing residential uses and certain guidelines are met. Section 16AA(m) of the Land-Use By-law and Policy 7.8.2.2 of the MPS refer. In staff's view, guidelines (ii) and (iii) of the above-mentioned policy are or can be met. The development does in fact have a good mix of apartments and sufficient space is provided on the lot to accommodate buffering from existing and potential adjacent industrial uses.

COMMENTS

The main problem staff has with this proposal relates to guideline (i). This deals with height of buildings. The guide line is 50 ft. or 6 storeys. Staff feels that 8 floors could also be considered within this guide line but going to this height staff would expect the building to meet all the R-3 residential controls, including density. This was discussed with the applicant on several occasions and he was advised that unless the zoning controls were met for an 8-storey building, staff could not give a positive recommendation.

This proposal is 8 storeys high and fails to meet the density requirements and, to a lesser extent, angle controls. Also, in the south end, commercial uses are only permitted in apartment buildings with 100 or more units. This building

> will contain 76 units.
>
> As noted above, the most serious Land-use By-law problem relates to density. the density, according to the Land-use By-law is 252.6 persons per acre. However, using .8 persons per habitable room instead of 1, as required by the By-law, and not counting the enclosed balconies, the density (134.7 persons per acre) still exceeds the maximum for this area of 125 persons per acre.
>
> CONCLUSION AND RECOMMENDATION
>
> Staff feels that it has gone as far as possible with concessions. It is felt that approval of this proposal would result in the construction of a building larger than that envisaged by the MPS for this area.
>
> If either the MPS height requirement or the Land-Use By-law requirement were met, staff would have no objections to the development.
>
> Therefore, for the reasons stated above, it is recommended that the contract development application to permit the construction of an 8-storey, 76-unit apartment/commercial building at 961 South Bland Street as shown on Plan No. P200/13279-80 of Case No. 4645 be refused and no public hearing be held."

Mr. Robertson referred to the definition of "Population Density" set forth on page 8 of the City's Land-Use By-law. This definition reads as follows:

> "Population Density - means the number of persons occupying a building(s) on a lot per one acre of gross lot area. In determining population density, the number of persons occupying a building on a lot shall be calculated on the basis of one person for each habitable room contained therein."

Mr. Robertson stated that at the January 31, 1985, meeting of the Council a date was set for a public hearing to discuss a revised second application whereby the number of units was reduced from 76 to 70 and the density was reduced from 134.7 persons per acre to 124 by using .8 persons per habitable room instead of the 1 person as set out in the Land-use By-law. Mr. Robertson would have recommended refusal of the revised second application and did so advise Mr. Richard Matthews, the Director of Planning for the City. The City's Staff Report dated February 13, 1985, and filed as Item No. 4 of Exhibit A-4 recommended approval of the revised application which eliminated 6 ground floor units.

A portion of the Staff Report dated February 13, 1985, states as follows:

> "Staff recommended refusal of that development primarily because it exceeded the density requirement, and to a lesser extent, did not meet the angle controls and commercial requirements (commercial uses only permitted in buildings with 100 or more units).
>
> On February 11, 1985, revised plans were submitted which eliminated all 6 ground floor units. Based on an occupancy rate of .8 persons per habitable room, and not counting the glass enclosed balconies, the density therefore has been reduced to 124 persons per acre, which is within the maximum of 125 persons per acre permitted by the Land-use By-law for this area.
>
> As a result of the reduction in units, the commercial (office space) has been increased to 10,000 sq. ft. However, it is confined to the ground floor and staff has no serious objections to this change. Because the size of the building remains the same, the angle controls are not met. However, as pointed out in the staff report dated January 15, 1985, on the 76-unit building, the encroachment is minor.
>
> This reduction in the number of units also increases the open space surplus to 3547 sq. ft. (from 2347 sq. ft.) and the parking surplus to 8 spaces (from 3 spaces).

> This 10.7 person per acre reduction (original density 134.7) eliminates the only serious Land-Use By-law deficiency. In staff's opinion, the intent of both the Municipal Planning Strategy and the Land-Use By-law have now been met.
>
> Therefore, it is recommended that the contract development application to permit the construction of an 8-storey, 70-unit apartment/commercial building at 961 South Bland Street as shown on Plan No. P200/13280 & 13541, be approved."

Mr. Robertson stated that in his opinion the method of calculating the density of the proposed development as set out in the City's Staff Report of February 13, 1985, is incorrect. He was of the opinion that the density should be calculated on the basis of one person for each habitable room not .8 persons. He also pointed out that this Staff Report did not mention the height of the proposed development.

Mr. Robertson was of the opinion that the revised development does not meet the requirements of the City's angle controls and the intent of the M.P.S. is not met with respect to the amount of commercial space. He also was of the opinion that the decision under appeal does not carry out the intent of the M.P.S. as stated in Policies 1.1 and 1.1.2 of Section V of the M.P.S. (South End Area Plan. These Policies read as follows:

> "1.1 Residential neighbourhoods shall be maintained and expanded by encouraging retention and rehabilitation of existing structures and units and by permitting new stock through infill and complementary redevelopment."
>
> "1.1.2 Residential redevelopment shall be permitted in the areas designated pursuant

> to this Plan and may be encouraged elsewhere provided it is consistent with the policies of this Plan."

Mr. Robertson referred to Policies 1.1.1 and 1.2 set out in Section II of the City-Wide Objectives and Policies which he felt were offended by the proposed development. These read as follows:

> "1.1.1 On the Peninsula, residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighbourhoods; and the City shall develop the means to do this through the detailed area planning process."

> "1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

Mr. Robertson pointed out that in his view Policy 7.8.2 of Section V of the M.P.S. relating to the South End Area Plan is a very important policy. It states as follows:

> "7.8.2 Within District VIII, in areas zoned as non-harbour-related industrial, new industrial development shall not exceed 35 feet in height or three storeys, and the City shall amend its Zoning By-law to accomplish this intent."

It is to be noted that District VIII of the South End Area Plan shown in the M.P.S. immediately following page II-105 includes the subject site. Thus there is a 35-foot height restriction in this District for new industrial development.

Policy 7.8.2.2 of Section V of the M.P.S. sets out the guidelines for the approval of contract development. Policy

7.8.2.2 reads as follows:

> "7.8.2.2 Pursuant to Policy 7.8.2 above, the City may consider applications for residential development where the proposed location is adjacent to existing residential uses under the provisions of Section 33(2)(b), and in so doing the City shall consider as guidelines:
>
> i) that the height of the proposed development is limited to 50 feet or six storeys;
>
> ii) that family-type accommodation shall not be a requirement for unit mix in such development; and
>
> iii) that there be adequate buffering from industrial uses which may adjoin the property on which the development is proposed."

On cross-examination by Counsel for the City Mr. Robertson admitted that the Council has a certain amount of discretion in relation to applications for the approval of contract developments. Counsel for the City suggested to the witness that the height restriction of 50' or six storeys stated in Policy 7.8.2.2 of Section V (South End Area Plan) of the M.P.S. was not an absolute but was only a "guideline" and that these figures could be exceeded if all other provisions of the M.P.S. are met.

Counsel for the developer pointed out to Mr. Robertson that there is a need for rental housing on the peninsula portion of Halifax City where the vacancy rate is 1% or less. Mr. Robertson agreed that this is so. Mr. Robertson also acknowledged that the City's Land-Use By-law contained provisions for contract development in the City's South End Area. Section 16AA(m) of the Land-Use By-law states as follows:

> "Notwithstanding anything else in this By-law:
>
> (m) Council may, by resolution, under the authority of Sections 33(2)(b) and 34 of the Planning Act, and Policy 7.8.2.2 of Part II, Section V of the Municipal Planning Strategy, permit any specific residential development in areas zoned for industrial development which would not otherwise be permitted by this By-law in accordance with said policy;"

On cross-examination by Council for the developer, Mr. Robertson agreed that the proposed development could be said to act as a buffer between the existing industrial uses to the south and east and the low-rise residential uses to the north. Mr. Robertson when questioned about the City's Generalized Future Land-Use Map covering the subject area pointed out that the copy of this map prepared by the staff in the City's Development Department and attached to the Staff Report dated August 2, 1984, (Exhibit A-19), is incorrect in that a portion of the boundary of the industrial lands is shown closer to the south side of Inglis Street than it should be.

Mr. Robertson pointed out that the allowable density is 250 persons per acre north of Inglis and 125 persons per acre south of Inglis Street.

Professor Kaiser called as his next witness, Professor Ann G. Wilkie who teaches urban and rural planning at the Technical University of Nova Scotia. Her curriculum vitae was filed with the Board as Exhibit A-24. Professor Wilkie was accepted by the Board as a person qualified to give expert testimony relating to land-use planning. She was employed by the City of Halifax as a Senior Planner between 1976 and 1979. She stated that she is familiar with the development proposal in question.

Professor Wilkie reviewed the events culminating in the approval in January, 1983, by the Minister of Municipal Affairs of a Detailed Area Plan (D.A.P.) for the South End. A Land-Use By-law was approved in February, 1983, as a tool to implement the Planning Strategy. It was a long process involving about 30 meetings of the D.A.P. Committee over a number of years. Professor Wilkie pointed out that there is a mandate in the City's M.P.S. for the preparation of the South End D.A.P. She also referred to Section 40 of the Planning Act which states that a M.P.S. may provide for the adoption of a secondary planning strategy as part of the M.P.S. to apply to a specific area. Section 40 states that the purpose of the secondary planning strategy is to address "issues with respect to a particular part of the planning area, which may not, in the Council's opinion, be adequately addressed in the Municipal Planning Strategy alone".

Professor Wilkie was asked to calculate the density of the proposed development consisting of 70 residential units. She excluded the glass-enclosed balconies in her calculation of the number of persons in the building based on the Land-Use By-law provision of one person per habitable room (see definition of "population density" set out in Section 1(dd)) quoted on page 26 of this decision. Her calculations are as follows:

28 bachelor units generate	28 persons
14 one-bedroom units generate	28 persons
28 two-bedroom units generate	84 persons

TOTAL: 140 persons.

She then stated that since 140 persons would occupy a lot area of .889 acres the density would be 157 persons per acre ($\frac{140}{.889}$ = 157).

Since the City Staff Report of February 13, 1985, item No. 4 of Exhibit A-4 employed a density factor of .8 persons per habitable room, Professor Wilkie was asked to calculate the density of the subject building based on .8 persons. Her calculations are as follows:

28 bachelor units generate	22.4 persons	(28 x .8)
14 one-bedroom units generate	22.4 persons	(28 x .8)
28 two-bedroom units generate	67.2 persons	(84 x .8)
	112.0 persons	

She then calculated that 112 persons on a .889 acre lot would result in a density of 125.98 ($\frac{112}{.889}$ = 125.98).

Professor Wilkie considered the February 13, 1985, Staff Report "misleading" with respect to its conclusion that the density has been reduced to 124 persons per acre, which is within the maximum of 125 persons per acre permitted by the Land-use By-law for this area". She stated that the 124 persons figure was arrived at by ignoring all decimal points and concluding that the building would be occupied by 111 persons rather than 112 by not dropping the decimal point. Staff excluded the glass enclosed balconies in their calculations. She said that she had some difficulty in applying .8 persons to a bachelor unit in calculating the density. She stated one should apply 1 person to each bachelor unit.

Professor Wilkie pointed out that Section 44(1) of the City's Land-Use By-law restricts the range of commercial uses in residential buildings in the R-3, Multiple Dwelling Zone (Third Density Residential). Commercial uses in residential buildings under the R-3 Zone are not permitted to have direct access from the exterior of the building and the commercial uses are for the exclusive use of the residents or their guests. Under Section 44A of the Land-use By-law certain commercial uses are permitted in apartment houses located in the south end which contain 100 or more dwelling units.

Professor Wilkie in discussing the provisions of Section 16AA(m) of the City's Land-Use By-law relating to contract development in the south end stated that this clause while giving to the Council the power to permit a residential development in an area zoned for industrial development, which would not otherwise be permitted in the By-law, does not give the Council the right to permit 10,000 sq. ft. of commercial space in a 70-unit apartment building.

She pointed out that the plans for the proposed development call for 64 underground parking spaces which are 8 more spaces than would be required for the residential users. She said there was apparently no provision for on site ground level parking. She was of the opinion that 10,000 sq. ft. of commercial space is a significant amount and would appear to be designed to serve more than the residential tenants in the building. This commercial space would therefore generate traffic and there would be few parking facilities for this traffic.

Professor Wilkie expressed concern about the 73' height of the proposed development which she considered to be a violation of the City's M.P.S. She pointed out that under Policy 7.8.2 of Section V of the M.P.S. the as-of-right height for new industrial development in District 8 in which the subject land is situate, is 35 feet or 3 storeys. The subject lot is in District 8 and is zoned C-3 Industrial which permits inter alia R-3 uses. Under Policy 7.8.2.2 the City may consider applications by way of contract for residential development at locations adjacent to existing residential uses and "shall consider as guidelines:

> "(i) that the height of the proposed development is limited to 50 feet or six storeys;
>
> (ii) that family-type accommodation shall not be a requirement for unit mix in such development; and
>
> (iii) that there be adequate buffering from industrial uses which may adjoin the property on which the development is proposed."

In the opinion of Professor Wilkie the 73' height of the proposed building exceeds the guideline figure of 50' and therefore the development conflicts with the M.P.S. as to height. She also pointed out that the 73' height exceeds the Land-use By-law as of right height of 35' by 38'. She expressed the opinion that to permit a height of 73' would require an amendment to the M.P.S. to change the guidelines.

Alan F. Duffus, a practising architect in Nova Scotia since 1946 and the President of Architectural Resource Consultants

Ltd. gave evidence for the Appellants. He stated that he is not involved in any architectural projects at the present time but acts as a consultant to his own firm and to his son's firm. He said it was disturbing to him to see apartment blocks intruding into the City's south end. He said this was to the detriment of the single family dwelling and to the low multiple unit buildings. He was of the opinion that the subject building was of mid height. He stated that large buildings in the south end over power and over shadow residences in the south end. He thought that one alone wouldn't ruin an area but two or three would begin to cause an area to deteriorate.

On cross-examination Mr. Duffus acknowledged that his firm had designed the Central Trust Tower and many large apartment buildings within the peninsula area of the City.

The City of Halifax called William D. Campbell, a Planner II employed in the Development Control Division of the Department of Development, City of Halifax. He has been employed as a planner for 10 years and holds a Bachelor's Degree in Environmental Studies in urban and regional planning from Waterloo University. He was acting Development Officer at the time of the hearing. He stated that he is involved in current planning matters including the preparation of staff reports to Council. He explained that the Planning Department of the City is involved in long term planning matters and the Development Control Division deals with development permit applications and development agreements.

Mr. Campbell is familiar with the proposed development which came to the City by way of an application for approval by Council of a contract development pursuant to Section 16AA(m) of the Land-use By-law. He said that this type of application does not have to meet the terms of the Land-Use By-law. He stated that the height of the proposed building was the major problem with the first application submitted for a 10-storey development. He said that the City's angle controls were only exceeded by a small margin in the first application. He said that the commercial area proposed in the second application was to be contained on one floor rather than two and the amount of commercial space was increased. In his opinion an enclosed balcony constitutes a habitable room while an open balcony is "open space". He stated that staff excluded balconies in their calculations of density.

Mr. Campbell pointed out that the proposed development was approved by the Council pursuant to the South End contract development provisions of Section 16AA(m) of the Land-Use By-law and therefore the development did not have to meet the specific requirements of the Land-Use By-law which are applicable to "as of right" developments. He said that Council could approve a specific residential development in an area zoned for industrial development which would not otherwise be permitted by the Land-use By-law if the development meets the intent of the M.P.S. and is within the guidelines of Policy 7.8.2.2 of Section V of the M.P.S. Mr. Campbell was of the opinion that the proposed development was within the intent of the M.P.S. Although staff had recommended against the approval of the first application with respect to a 10-storey structure with commercial space on the first two floors because of the height and density of the development being considered excessive, he considered the development approved by the City as being within the intent of the M.P.S. including Policy 7.8.2.2. of the M.P.S. He did not consider that 6-storeys and 50 feet were maximums but were merely guidelines. When asked on cross-examination if he thought a nine-storey residential building would meet the guidelines set out in Policy 7.8.2.2. he would not give an opinion.

Mr. Campbell in explaining why he thought it was proper for staff to calculate density for the proposed development on the basis of .8 persons per habitable room rather than one person per habitable room, stated staff had carried out a study which indicated that the actual occupancy rate in the City was something less than one person per habitable room and therefore .8 persons was a more realistic figure to use than the By-law figure of one person. He stated that the .8 person rate had been used by City staff in assessing the density of the United Equities development on Summer Street. On the other hand, Mr. Campbell was not prepared to recommend to City Council that the one person per habitable room By-law stipulation be changed to .8 persons without some further research.

On cross-examination of Mr. Campbell it was pointed out to him that the developer's first application contained 7600 sq.ft. of commercial space on two floors which had been a problem for staff but the development finally approved by the Council had 10,000 sq.ft. of commercial space on the first floor. Mr. Campbell's response was that 10,000 sq. ft. "seems like a lot of commercial space for an apartment building but I really have no definite opinion against it." Mr. Campbell was of the opinion that one full floor of commercial space would not infringe on the integrity of the existing neighbourhood within the meaning of Policy 1.1 in the City-Wide Objectives and Policies of the M.P.S. which reads as follows:

> "1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

Also on cross-examination Mr. Campbell was unable to cite a policy in the M.P.S. which encourages commercial development on the subject site.

Counsel for the developer chose not to call any evidence.

Post-hearing submissions were filed by the parties by August 12, 1985, on both the issue of whether any or all of the Appellants are "aggrieved persons" as those words are used in Section 71 s.s.(1)(a) of the Planning Act S.N.S. 1983 c. 9 and also with respect to the merits of the appeals. Counsel for the Appellants Edward Backman et al, had filed a pre-hearing submission on the issue of standing.

The issue of whether any or all of the Appellants are "aggrieved persons" will now be addressed. If the Board finds that any one of the Appellants is an "aggrieved person" then the Board will have jurisdiction to determine the issue of whether or not the Council's decision can reasonably be said to be consistent with the intent of the City's M.P.S. If the Board finds that none of the Appellants are "aggrieved persons" the Board will be obliged to dismiss the appeals for lack of jurisdiction and will therefore not have jurisdiction to render a decision on the merits of the appeal.

The appeals in this case were brought pursuant to s.s. (1) of Section 71 of the Planning Act, which reads as follows:

> "Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, the decision of the council may be appealed by
>
> (a) an aggrieved person;
>
> (b) the Director;
>
> (c) the council of an adjoining municipality."

Evidence was adduced that Edward Backman, Joan Backman, Michael Duda and Brian White, all of whom signed the first Notice of Appeal filed as Exhibit A-1, are the owners of and reside in condominium units in the development known as Bishop's Row, a residential complex immediately north of and adjacent to the subject property.

Mr. Backman expressed the opinion that the proposed development would cause his property to be devalued. This evidence was not rebutted. Michael Duda expressed concern that the development would cause the character of his neighbourhood to change. Brian White expressed concern about the possible devaluation of his property as the result of the subject site.

All of the Appellants who own property and reside in Bishop's Row are persons who in the opinion of the Board qualify as "aggrieved persons" as those words are used in Section 71(1) of the Planning Act.

Counsel for both the developer and the City while they questioned the Appellant status of some of the persons who signed the Notices of Appeal did not question the Appellant status of those persons who signed Notices of Appeal and who resided and owned property in Bishop's Row. In fact, they acknowledged that the residents of Bishop's Row are aggrieved persons.

Counsel for the developer in his post-hearing memorandum states at page 6 that "It is conceded that the residents of the Bishop's Row Condominium Project, namely Edward and Joan Backman, Michael Duda and Margaret and Brian White are aggrieved persons due to the proximity of the proposed development and accordingly the Board did have jurisdiction to hear the appeal". Counsel for the developer however was unwilling to concede that the other Appellants were "interested persons" who could be permitted by the Board to participate in the hearing pursuant to s.s. (4) of Section 27 of the Municipal Board Act, S.N.S. 1981, c. 9, which reads as follows:

> "The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing."

Counsel for the City in his post-hearing memorandum stated at page 5 that the grievance of those Appellants owning condominium units in Bishop's Row "arose basically from the fact that they felt that the value of their units would be affected by the proposed development if it were constructed. As well, it was their position that their quality of life would be affected. The City does not contest the status of these individuals or Appellants". Counsel for the City submitted that none of the other Appellants qualified as "aggrieved persons".

In a decision of the Board respecting an appeal by Riverlake Residents Association dated April 30, 1985, rendered by Elizabeth Lawrence, Vice-Chairman, the Board dismissed the appeal brought by Riverlake Residents Association under Section 63(1) of the Planning Act from a decision of the Council of the Municipality of the County of Halifax on the basis that the association was not an "aggrieved person". Section 63 of the Planning Act provides a right of appeal from the "amendment, revision or refusal by a council to amend or revise the land-use by-law" to an aggrieved person, the applicant, the Director and to the Council of an adjoining municipality. Riverlake endeavoured to qualify as an Appellant by virtue of its allegations of being "an aggrieved person". On the facts adduced at the Riverlake hearing and after a review of the legal authorities cited in argument the Board stated at page 31 of its decision that "the Appellant does not have a legal grievance in this matter, it has not been denied some personal or property right or had imposed upon it a burden or obligation and therefore is not an 'aggrieved person' in the matter of this hearing".

The Board in the Riverlake decision stated at page

28 that:

> "The Planning Act requires that an Appellant, pursuant to Section 63(1) be an "aggrieved person". The former Planning Act required that an Appellant of a similar decision be an "interested person". The Board concludes that notwithstanding that a stated purpose of this Act is to establish the right of the public "to be notified and heard before decisions are made under the Act", the change of criteria for an Appellant from "interested person" to "aggrieved person" can be construed no other way than as an intention to restrict to some degree those who have the right to appeal this type of decision. The issue then becomes the degree to which the term "aggrieved person" is more restrictive than the term "interested person", and whether or not the Association meets this test".

Although the appeals now under consideration were brought under Section 71 of the Planning Act, the above quoted passage from page 28 of the Riverlake decision applies to the subject appeals brought under Section 71 as well as to appeals under Section 63.

In the Riverlake decision at page 32 the Board observes that "there may be individuals who might meet the statutory requirements of Section 63(1) of the Act to be aggrieved persons in the matter of this appeal, or that the Appellant might itself meet the statutory requirement in another appeal. In the matter of this appeal, however, the Board is of the opinion that the Appellant has not shown that it is an 'aggrieved person' by reason of having suffered a legal grievance or the imposition of a burden or obligation, or by reason of a denial of some personal or property right".

The Board in the Riverlake decision followed the law as stated by Coffin J.A. in Halifax Atlantic Investments et al v. City of Halifax 28 N.S.R. (2d.), 193 at page 214 where he states that "after a review of the authorities it is my opinion that the facts must be within the reasoning of such cases as Ex. Parte Sidebotham before a person can bring himself within the statutory meaning of a party aggrieved".

In Ex Parte Sidebotham [1880] C.D. 459, it was held at page 465 that "...the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

In the Riverlake decision, the Board, based on the facts of that case, and after an examination of the case law cited by Counsel, found that the Appellant did not have a "legal grievance" and was not "denied some personal or property right or had imposed upon it a burden or obligation and therefore is not an "aggrieved person" in the matter of this hearing."

If a person appeals a decision made under the Planning Act as an "aggrieved person" he must, in the opinion of the Board have a legal grievance, that is he must have a lawful complaint or injury. His complaint or injury must be lawful that is, sanctioned or recognized by law. He must show something more than mere dissatisfaction with a decision he seeks to appeal. He must also be shown to have something more than a mere "interest" in the decision appealed.

The Oxford Universal Dictionary, 3rd Edition defines "aggrieved" as "injuriously affected, having a grievance". This dictionary defines "grievance" as "the infliction of wrong or hardship on a person; injury, oppression; a cause or source of injury".

In the appeals now under consideration by the Board some of the persons claiming to be persons aggrieved and therefore entitled to the status of Appellants under the Planning Act, are the owners and residents of condominiums in Bishop's Row. These persons consider themselves aggrieved persons for various reasons set forth in the foregoing summaries of their evidence. All of them own property in which they reside which is in close proximity to the subject property. In fact their properties are part of a condominium development which abuts the subject property to the north. The mere fact of being abutting owners or residents does not in itself give them the status they claim as Appellants, but it is a factor which is relevant in the determination of their status. The closer a person is to a development the more likely is that person going to be affected either positively or negatively by the development.

If the proposed development can reasonably be said to have a positive effect on a person or his property he is not likely to be injured or suffer damage and therefore he has not been denied some personal or property right and has not had a burden or obligation imposed on him. He therefore is not an "aggrieved person".

If on the other hand the proposed development would have a negative or adverse effect on a person or his property whether in close proximity or not, then that person might be said to be a person aggrieved. If a proposed development may reasonably be said to have a negative impact on the property of another person it undoubtedly would have an injurious effect on the other property which in any given situation could be expressed in terms of a reduction (whether large or small) in the value of the property which is adversely affected.

All citizens of a municipality where a M.P.S. is in effect, have the right to expect their elected Council in approving contract developments which are not permissible "as of right" under the Municipality's Land-Use By-law, to make decisions which are reasonably within the intent of the Municipality's M.P.S. What legal remedies are available (if any) to citizens at large to enforce this right is not a matter for this Board's consideration. The Planning Act, however, does provide for a right of appeal by an "aggrieved person" from a decision of a Council approving a development agreement not permissible as of right under a Municipality's Land-Use By-law.

It appears to the Board that it is virtually impossible for the Board to determine in any given situation whether or not a person who appeals to the Board in the guise of an "aggrieved person" from a decision of a Council approving a contract development is in fact and law an "aggrieved person" unless the Board has before it adequate evidence relating to the proposed development to determine the effect of the development on the person appealing.

In the case at hand it is the Board's opinion that all of those Appellants owning property and residing in the Bishop's Row condominium development are aggrieved persons and therefore have the status of Appellants under the provisions of s.s.(1)(a) of Section 71 of the Planning Act.

They are "aggrieved persons" because the Council's decision in approving the proposed development is a decision which in the opinion of the Board would have a negative or adverse effect on the Appellants' enjoyment of their properties for a number of reasons including the fact that the proposed building being eight storeys in height would be incompatible with the three storey condominium property immediately adjacent to the north. The unrebutted evidence is that the scale and height of the proposed development will devalue the properties owned by the Appellants who reside in the Bishop's Row condominium property. Furthermore, this proposed development will undoubtedly have an adverse effect on these Appellants because of the anticipated extra traffic coming to and from the development which is likely to compound the existing parking difficulties in this area. The relatively large (10,000 sq. ft.) of commercial space proposed for the ground level of the development will attract considerable vehicular traffic to the site and there appears to be inadequate provisions for parking facilities respecting the commercial use of the building. In the Board's opinion those Appellants owning property and residing in the Bishop's Row Condominium property have had imposed upon them a burden and thus they may be said to have suffered a legal grievance. It is of no consequence that the owner of the subject site could on an "as of right" basis construct an industrial development which might have as great or a greater detrimental effect on the Appellants than the proposed residential/commercial development.

The Appellants who reside in Bishop's Row have a legal grievance arising out of the fact that the approval of the proposed development would have an adverse or injurious effect on them. They are therefore aggrieved persons entitled to present their case to the Board as Appellants pursuant to s.s. (1)(a) of Section 71 of the Planning Act.

Having determined that some of the Appellants (residents and owners of property in Bishop's Row) are aggrieved persons it is not essential to the Board's assumption of jurisdiction that the question of whether or not the other Appellants are aggrieved persons is determined. However, because the status of the other Appellants was in dispute the Board wishes to make some brief commentary on this question.

Firstly, the Board is of the opinion that the Appellant, the Ward One Residents' Association, is not an aggrieved person basically for the same reasons as the Board set forth in the Riverlake decision respecting the status of the Riverlake Residents' Assocaition. The Board is of the opinion that the Ward One Residents' Association has not been denied some personal or property right or had imposed upon it a burden or obligation and thus has not suffered a legal grievance. It is not the owner of property which could be affected by the proposed development. The Board however, is of the opinion that the Ward One Residents' Association has demonstrated to the Board that it has a sufficient real and substantial interest in the proceedings to be permitted to participate in the hearing pursuant to s.s. (4) of Section 27 of the Municipal Board Act.

The determination of the status of the remaining Appellants is a much more difficult matter. It is doubtful that Donald Higgins, Anne Derrick and H.A. Kaiser are "aggrieved persons" because their properties are sufficiently remote from the subject site so as not to be adversely affected by the proposed development. The Board is of the opinion however, that these persons have demonstrated to the Board that they have a sufficient real and substantial interest in the subject matter of the proceeding to be permitted to participate in the hearing pursuant to s.s. (4) of Section 27 of the Municipal Board Act.

Turning to the merits of the appeal, the issue is clear, namely, was the decision of the Council in approving a development agreement for the property known as Civic No. 961 South Bland Street, consistent with the intent of the M.P.S.?

The evidence establishes that the subject site is located in the "South End Area" of the City and is therefore subject to the detailed objectives and policies for the South End Area set forth in Section V of the City's M.P.S. The site is, of course, also subject to all other relevant provisions of the M.P.S. including the City-Wide Objectives and Policies set forth in Section II of the M.P.S. The site is also subject to the relevant provisions of the City's Land-use By-law.

Although the subject site and the lands to the south and east of the site are Zoned C-3 (Industrial Zone), the adjoining land to the north is Zoned R-3 (Multiple Dwelling Zone). The land on the opposite side of South Bland Street from the subject site is Zoned R-2A (General Residential Zone) (South End) and is primarily developed for single family dwelling purposes although a curling club occupies a site in the middle of the block between Inglis Street on the north and Atlantic Street on the south.

The proposed development consisting of a residential/commercial building eight (8) storeys high is a development which is not permitted "as of right" under the City's Land-use By-law. Under the C-3 Zone the following uses are permitted, viz:

> "(a) R-1, R-2, R-3, C-1 and C-2 uses as hereinbefore set out;
>
> (b) Any industrial enterprise except when the operation of same would cause a nuisance or a hazard to the public."

The Land-use By-law contains provisions in Section 16AA whereby the Council may by resolution permit certain uses and developments not otherwise permitted by the Land-use By-law. The approval by the Council of the development in question was made pursuant to Section 16AA(m) of the Land-use By-law quoted on Page 31 of this decision. This Section authorizes the Council to permit a specific residential development in an area zoned for industrial development which would not otherwise be permitted by the Land-use By-law provided the development comes within the guidelines set forth in Policy 7.8.2.2 of Section V of the M.P.S. Policy 7.8.2.2. is quoted in full on Page 30 of this decision.

The Board is required under the provisions of s.s.(3) of Section 71 to "determine whether the proposed agreement is consistent with the intent of the Municipal Planning Strategy."

If the Board finds that the proposed development does not meet the mandatory guidelines which the Council is obliged to consider by virtue of Policy 7.8.2.2., then the Board must make a determination that the proposed agreement is not within the intent of the M.P.S. The proposed development must of course generally meet the intent of the M.P.S. as well as come within the guidelines set forth in Policy 7.8.2.2.

The Board agrees with the comments of Robert W. Robertson, a planner employed by the City, contained in his memo dated November 6, 1984 (Exhibit A-20) where he states that:

> "In general terms, residential development may be permitted on this site provided that the scale and intensity of use is restricted so as to maintain the integrity of the 'Industrial' designation in respect to the intent of the Plan; and, to ensure that a development is in character with adjacent residential neighborhoods, pursuant to the 'Residential Environments' Policy set."

Mr. Robertson also states in this memo that "The guidelines contained in Policy 7.8.2.2. are intended to provide the quantitative measure(s) against which a development is to be tested. In my view, an eight-storey residential development of approximately 75 feet does not meet the policy intent of the 'Industrial' designation---------." Mr. Robertson also observes in his memo that he "would argue that the proposed development contravenes the thrust of the 'Residential Environment' set concerning compatability, notably Policy 7.8.2.2. regarding six storeys or 50 feet." The Board agrees with Mr. Robertson in these observations and with his recommendation that the application be refused.

The Board notes that the City Staff Report of January 15, 1985 (Item #1 of Exhibit A-4) in recommending refusal of the second application for an 8 storey, 76 unit apartment/commercial building states that:

> "It is felt that approval of this proposal would result in the construction of a building larger than that envisaged by the M.P.S. for this area."

It seems inconsistent on the part of Staff to have subsequently recommended approval of a revised version of the second application whereby six ground floor apartment units were eliminated and the commercial space was increased to 10,000 sq.ft. It is important to note that the "size" of the building remained the same. Logically if the 8 storey, 76 unit building was too large then it follows that a similar sized building containing more commercial space but fewer apartment units (70) would also be too large.

It is the opinion of the Board that the Council's decision in approving the proposed development does not meet the intent of the M.P.S. and specifically does not meet the intent of Policy 7.8.2.2. of Section V of the M.P.S. which authorizes the Council to "consider" applications for residential development where the proposed location is adjacent to existing residential uses but which sets forth "guidelines" which the City must consider. These guidelines have been fully quoted previously in this decision. The first of these "guidelines" states that "the height of the proposed development is limited to 50 feet or six storeys." This guideline must be considered in the context of the other policies set forth in Section V of the M.P.S. relating to the South End Area. One of these is Policy 7.8.2. which states that:

> "Within District VIII, in areas zoned as non-harbour-related industrial, [which is the case at hand] new industrial development shall not exceed 35 feet in height or three storeys, and the City shall amend its Zoning By-law to accomplish this intent."

Thus it would appear that if new industrial development were proposed for the subject site, a height limitation of 35' would apply. Therefore one can assume that the intent of the M.P.S. is to restrict heights in the City's South End in certain situations. An exception to the 35' height restriction is provided for in Section 16AA(m) of the Contract Provisions of the Land-use By-law which authorizes the Council to permit a residential development pursuant to Policy 7.8.2.2. of Section V of Part II of the M.P.S. This Policy previously quoted in full, restricts the height in residential development in industrially zoned areas to be within the height guideline of 50 feet or 6 storeys. While the Board agrees with Counsel for the City that the heights referred to in the guidelines are not absolutes or maximums, they must nevertheless be given some meaning. It is the Board's opinion that the proposed building being 8 storeys or 73' high is not within a height guideline of 6 storeys or 50'.

The Board is of the further opinion that the Council's decision does not reasonably meet the intent of the M.P.S. in that the decision does not meet the intent of Policy 1.1.1 of the Residential Environments portion of the City-Wide Objectives and Policies of the M.P.S. Policy 1.1.1 states that:

> "On the Peninsula, residential development should

> be encouraged through the retention rehabilitation and infill compatible with existing neighborhoods; and the City shall develop the means to do this through the detailed area planning process."

The Board is of the opinion that the proposed development is not compatible with the existing neighborhood in that it contains an excessive amount of commercial space and is too high in comparison to the two or three storey residential properties to the north and also on the west side of South Bland Street.

The Board having carefully reviewed the evidence adduced at the hearing, having viewed the subject site and surrounding area, having perused the briefs filed by the parties and having examined the City's M.P.S. and Land-use By-Law has determined that for the reasons stated in this decision it should interfere with the decision of the Council on the basis that its decision cannot reasonably be said to be consistent with the intent of the City's Municipal Planning Strategy.

The Board is authorized under s.s.(4)(b) of Section 71 of the Planning Act to "make any decision the Council could have made". The Board therefore allows the appeal and rejects the application for contract development to permit the construction of an 8-storey, 70-unit apartment/commercial building at 961 South Bland Street approved by the Council of the City of Halifax on March 28, 1985.

An Order will issue accordingly.

DATED at HALFIAX, Nova Scotia, this 7th day of January, A.D., 1986.

RHBlois

R.H. BLOIS
Chairman

EASalton

ELIZABETH SALTON (formerly
ELIZABETH LAWRENCE)
Vice-Chairman

RICHARD L. WELDON
Member.

Robertson v. County of Cape Breton

PLANNING--CONTRACT ZONING--REFUSAL OF DEVELOPMENT AGREEMENT TO PERMIT CONVENIENCE STORE--CONSISTENCY WITH INTENT OF M.P.S.--NOT PRIMARILY INTENDED TO SERVE NEEDS OF LOCAL NEIGHBOURHOOD--PLANNING ACT, SS. 42, 60, 61, 62, 72--COUNTY OF CAPE BRETON M.P.S., SECTION 10, POLICIES 5, 8, 10; SECTION 16, POLICY 6; SECTION 17

This is an appeal by J.T.R. from a decision of the Council of the Municipality of the County of Cape Breton refusing to approve a development agreement to permit the construction of a convenience (confectionary) store on Highway 4. The site is located on the opposite side of the highway to the entrance into the largest residential subdivision in the Municipality (Floral Heights), contains approx. 41,032 sq. ft. with 229 ft. highway frontage, has an existing well and septic system and is zoned Residential Unserviced Country (RUC). A Municipal Planning Strategy (M.P.S.) covers the subject area.

HELD: The appeal is dismissed.

In weighing the evidence and argument presented to it, the Board is to be guided by s. 72(4) of the Planning Act. In this case, the Board should not interfere with the decision of Council because the decision to refuse to enter into a development agreement is consistent with the intent of the M.P.S. The M.P.S. makes it clear that Council intended to restrict commercial development along Route #4 in this area to the existing uses, although a small commercial node was designated to serve the large residential area of Floral Heights Subdivision and new confectionary stores could be considered by development agreement pursuant to Policy 6 of Section 16 of the M.P.S. Policy 6 requires that the "use must primarily be intended to serve the needs of the local neighbourhood." Here the Appellant himself stated that he expected 30% of his anticipated business from the local area and 70% from "highway traffic." Concerns were also expressed about "traffic generation," a factor Policy 6 requires to be considered. It would also not be consistent with the policies of the M.P.S. to allow a new confectionary store directly opposite one of the three access roads to Floral Heights when the designated commercial node to serve it exists only 1000 ft. away and has not been fully utilized. With respect to the failure to provide an opportunity for public participation in accordance with Part 17 of the M.P.S., there was no necessity for a public hearing on this application. Only if Council intends to consider the approval of a development agreement does the Planning Act requirement for a public hearing following advertised notice apply.

NSMB-491-85-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9, as amended;

- and -

IN THE MATTER OF: An Appeal by J. TERRANCE ROBERTSON from a decision of the Council of the Municipality of the County of Cape Breton made May 21, 1985, which refused to approve a development agreement to permit the construction of a convenience store on the west side of Highway No. 4 in Howie Centre.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: NEIL F. MCMAHON, LL.B., for the Appellant

DAVID N. MUISE, LL.B., for the Municipality.

DECISION

A hearing was held by the Board in the Council Chambers of the Municipality of the County of Cape Breton on August 13, 1985, on an appeal by J. Terrance Robertson, pursuant to Section 72 of the Planning Act, from a decision of the Council of the Municipality of the County of Cape Breton made May 21, 1985, which refused to approve a development agreement to permit the construction of a convenience store on the west side of Highway 4 in Howie Centre. The Notice of Appeal (Exhibit R-1) was dated June 7, 1985 and received by the Board June 10, 1985.

The grounds for this appeal are:

> " That my property is located in an area with respect to which the planning strategy specifically allows for development agreement for uses outside the existing zoning and such strategy does in fact expressly refer to

> allowing development agreement for the very purpose for which I seek approval, namely, a convenience store, and in spite of this the Cape Breton County Council in reaching its decision on my application gave me no hearing and in fact gave no consideration to any factors relevant to my proposal which were favorable to it and which factors were numerous."

Counsel for the Appellant filed an affidavit in proof of service of the Notice of Hearing on those persons whom the Board had directed be so served. It was agreed by the parties that all legal requirements of the Planning Act and the Municipal Board Act had been met and the Board assumed jurisdiction to hear the appeal on its merits.

The property for which the Appellant had made application for a development agreement is located in District 10 of the Municipality on the west side of Highway No. 4 in the community of Howie Centre. The property is located on the opposite side of the highway from Floral Heights Drive which is the entrance to the largest residential subdivision in the Municipality, Floral Heights Subdivision. The subject property contains approximately 41,032 square feet with 229 feet of frontage on the highway. There is an existing well and septic system on the site. The property is zoned Residential Unserviced Country (RUC).

Counsel for the Appellant and Counsel for the Municipality each called five witnesses. Two persons gave evidence on their own behalf.

The Appellant, John Terrance Robertson, the owner of the subject property and the applicant for a development agreement, gave evidence on the nature of the property and his intentions for a convenience store. Mr. Robertson filed a plan of the subject property

(Exhibit R-5), dated December 16, 1977 but unsigned, which shows that the parcel of land is irregularly shaped, 187 feet deep, and has a 32 foot right-of-way along its western boundary from Highway No. 4 to the rear of the property. The plan shows a house located on the property set back 8 feet from the highway.

Mr. Robertson explained that he had purchased the subject property from his grandmother in 1978 and had rented the 2-unit residence for 7 years until the house was removed because of the expropriation by the Department of Transportation. His intent in proposing to construct a convenience store on the property was to replace the income previously generated by the rental of the two residential units.

Mr. Robertson intended to operate the proposed convenience store with a partner, Mr. Tipert, which would give employment to both men who were currently unemployed. The store was intended to be operated from 7:00 A.M. to 10:00 or 11:00 P.M. The store would be 24 feet by 40 feet in size, with an adequate paved parking area. Mr. Robertson said the sight distance from the property was very good with a 400 foot unobstructed view down the highway towards Sydney and a 1500 foot unobstructed view in the opposite direction.

Mr. Robertson felt that the residents of the neighbourhood were agreeable to the construction of his proposed convenience store and he was unhappy that he had not had the opportunity to make his case before Council at a public hearing.

In cross-examination, Mr. Robertson acknowledged that a survey of area residents to establish whether they supported the proposed convenience store had been taken after the Municipal Council had refused his application for a development agreement.

Mr. Robertson said that there were three other convenience stores on the same side of Highway No. 4 as the subject property, between the City limits to the east and "7 Mile Bridge" which is the boundary of District 10, lying approximately 2000 feet west on Highway No. 4. The nearest of the 3 convenience stores on the same (west) side of the highway is one mile distant, although there is a convenience store just 1000 feet away on the opposite (east) side of the highway, adjacent to an Esso gas station in an area designated for commercial development by the Municipal Planning Strategy (MPS). Mr. Robertson had been aware of the planning process which resulted in the MPS for District 10 but had not participated in it.

Mr. Robertson expected that 30% of the business in his proposed convenience store would come from the residential subdivision across the highway and 70% would be "highway business". Mr. Robertson said that he expected that pedestrian crosswalks would be put in place at each intersection of a major residential street with the highway because the majority of pedestrians would have to cross the highway to reach the sidewalks which exist only on the west side of the highway. Mr. Robertson believed that his property was on the proper side of the highway to capture most of the homeward-bound evening traffic.

Mr. Wayne Tipert, who would be a partner with the Appellant in a proposed convenience store business, lives in Sydney River, 5 km. from the subject property in District 10. Mr. Tipert had circulated a petition in the Floral Heights Subdivision which he filed as Exhibit R-9. The heading on the petition reads as follows:

> "District #10, County of Cape Breton, Area #111 of Municipal Planning Strategy as a Resident Property Owner in District #10, Area #111. Are you in favor of a Confectionery Store on the Robertson Property (Lot #15037304) across Highway #4 from Floral Heights Subdivision".

Mr. Tipert contacted 207 residents of approximately 240 in the Floral Heights Subdivision; one indicated that he was not in favour of the proposed confectionary store and seven were "indifferent", with the remainder indicating approval.

Mr. Tipert explained that he had attended a couple of planning meetings during the development of the MPS for District 10 but was not chosen for the citizen participation committee to work on the MPS. District 10 was divided into 3 subdistricts for the purpose of the MPS process. The subject property is in Area C and Mr. Tipert lives in Area B.

Mr. Tipert marked the 3 existing convenience stores referred to by Mr. Robertson on a District 10 Land-use By-law Map (Exhibit R-3). The two stores located in District B, which are the closest on the west side of the highway to the subject site, have now, he said, "almost no parking" because of the recent highway expropriations. The convenience store adjacent to the Esso Service Station, 1000 feet away from the subject property on the opposite side of the highway also has limited parking available to customers because of the service station traffic. Mr. Tipert said that many people he had talked to while circulating the petition had expressed frustration with the parking situation at existing convenience stores which they used for shopping on the way home from work in the city.

Councillor Richard Graves who has represented District 10 since 1979, lives in Sydney River in planning Area B of the district. Councillor Graves had participated in each of the area planning processes which resulted in the District 10 MPS. He recalled that Area C residents had not wanted stores located in residential subdivisions. Because of a lack of participation in the planning process by residents along Highway No. 4, the planning group in Area C had not wanted to designate the lands fronting on the highway commercial. The Councillor believed that some sites which were designated commercial in the planning process would not be so developed because of a high watertable. Councillor Graves had been in favour of Council holding a public hearing on the Appellant's application for a development agreement and he believed that the location of the proposed convenience store was compatible the the MPS because Area C was growing in population and in need of commercial development.

In cross-examination, Councillor Graves indicated that at a meeting in 1983 with the then Minister of Transportation, area residents had indicated that they did not want Highway No. 4 widened to carry 4-lane traffic or the installation of sidewalks on both sides of the highway. The only existing sidewalk is on the west side of Highway No. 4 (the same side as the subject property) which is on the opposite side of the highway from the largest residential developments in District 10. Councillor Graves was unsure about the possibility of a crosswalk being approved by the Department of Transportation in the vicinity of the subject property.

Peter Guthro, an environmental technologist with the Department of Environment for 8 years, reviews development plans, proposed highway alignments, etc., for the Department. He filed a copy of a letter dated May 30, 1985, from Mr. G.A. MacDougall, Coordinator of Operations in the Sydney Office of the Department, to the Secretary of the Cape Breton County Board of Health. The letter (Exhibit R-10) comments on the status of lots 16R and 17R in the Floral Heights Subdivision. The Esso service station and convenience store previously mentioned are located adjacent to Lot 16R. Lot 17R lies adjacent to it to the east, with frontage on Highway No. 4 on the north and Posure Street, an internal street in the Floral Heights development, on the south. Exhibit R-10 states:

> " Staff of this Department has reviewed the Department of Health's report on the above subject and offer the following comments:
>
> The Riverside Phase of the Floral Heights development was originally submitted for subdivision approval in July of 1982. Approval was requested for 17 lots, and staff felt that lots 16R and 17R should not be given approval because a drainage problem existed in that immediate area. At one time, a swamp existed in the area of lot 17R. The swamp was infilled without authorization a few years ago. The water that once collected there

> now gets backed up in a drainage way between lots 16R and 17R and causes flooding and water table fluctuations. This problem is compounded by a culvert under Route 4 to Sydney River. When the water level rises in Sydney River, the culvert effectiveness is reduced and backs up water into the drainage way shown between lots 16R and 17R (see attached plan). Under the "Water Act", this drainage way is a watercourse and, effectively, a part of the Sydney River water supply.
>
> The water table has been determined to be four to five feet below the surface. This was measured from site test pits and excavations by the Department of Transportation. This would be very close to the water level in Sydney River and would probably fluctuate with the water level in Sydney River.
>
> The high water table and the drainage problem in this area certainly make this lot questionable in regard to development so close to a public water supply. The long-term protection of the Sydney River water supply would be better served if these lots were developed for recreational use and not for residential, commercial, or industrial uses."

In cross-examination, Mr. Guthro agreed that his department does not issue permits for residential development but offers comments on any matters referred to it. Sydney River is the water supply source for the Sydney Steel Plant, Sydport, and areas of Westmount, Coxheath and Kings Road. All of District 10 lies within this undesignated watershed. Mr. Guthro stated that he understood that the current status of Lots 16R and 17R was that they had been consolidated into one lot which had been approved by the Metro Planning Commission.

Mr. Gary Ellerbrok, who lives in the Floral Heights development, expressed the opinion that Council should have allowed the public to be involved in this aspect of the planning process by approving a public hearing on the Appellant's application for a development agreement. Mr. Ellerbrok was a co-chairman of the public participation committee in Area B of District 10.

Mr. Ellerbrok was familiar with the subject site and agreed with the development proposed by the Appellant.

In cross-examination, Mr. Ellerbrok stated that he had not attended Area C meetings (the area in which he lived and in which the subject property is located). He did not participate in the discussions which led to the designation of a "commercial node" in Area C, although he was a member of a steering committee which drafted the MPS for the whole of District 10. Mr. Ellerbrok agreed that the potential commercial development of Lots 16R and 17R might be preferable for residents of Floral Heights but he thought it would not be better for Highway No. 4 traffic.

Counsel for the Municipality called as his first witness Mr. Donald Poole who has been a planning technician with Metro Planning Commission for 5 years, and was involved with the District 10 planning process in the winter of 1983, working with another planner in Area C and later helping to write certain sections of the MPS. Mr. Poole said an overriding policy of the MPS was to encourage commercial development in commercial nodes of approximately 3 acres in size, and that the Area C public participation committee had felt that traffic problems on Highway No. 4 would be compounded if more confectionary stores were encouraged and had instead felt that a consolidated commercial area would be better.

Mr. Poole wrote the staff report for the Planning Commission on the Appellant's application. The report is dated May 13, 1985 and contained in Exhibit R-2. Mr. Poole stated that his report was considered by the Municipality's Planning Advisory Committee (PAC) on the same date, which accepted the recommendation of the report to refuse to enter into a development agreement for the construction of a confectionary store on the subject property. The minutes of that PAC meeting, contained in Exhibit R-2, state:

> "It was moved by Councillor Hall; seconded by Councillor MacArthur that the Planning Advisory Committee recommend rejection of the approval to advertise Case #G-16-CBM to Council."

The Minutes of the Municipal Council Meeting of May 21, 1985, also contained in Exhibit R-2, indicate that Council accepted the recommendation of the PAC and agreed not to advertise a public hearing on this application.

Mr. Poole stated that the Appellant's property, in his opinion had similar advantages to the designated commercial node, however Policy 6 in the MPS specifically refers to an establishment which would serve local needs. This would, he felt, indicate the needs of the population which was located primarily on the commercial node side of Highway No. 4. Policy 6 of Section 16 of the MPS states:

> [It shall be the policy of Council;]
>
> "Policy 6 to consider new confectionary stores in any part of District #10 outside the By-pass but only by development agreement. In considering a proposal to permit a confectionary store by development agreement, Council shall have regard for the following:
>
> a) the use must primarily be intended to serve the needs of the local neighbourhood and shall be located outside the by-pass.
>
> b) the possibility of adverse affects caused by traffic generation and parking needs:

- litter
- loitering, and
- the visual appearance of the use in relation to the surrounding development."

In cross-examination, Mr. Poole said that vehicular traffic was similar between the subject property and the commercial node, but that pedestrian traffic was more of a concern. He stressed however, that his opinion of the Appellant's proposed development was based on the policies of the MPS, not on traffic concerns.

Mr. Poole said that the concerns expressed in the Department of the Environment's letter (Exhibit R-10) were not known to the public participation committee when the commercial node was designated. He acknowledged that at one time the west side of Highway No. 4 had been designated commercial as well by the committee, however the committee dropped that designation because of anticipated increased environmental problems for the watershed related to the proximity of the area to the Sydney River.

In conclusion, Mr. Poole said that notwithstanding Policy 6 of Section 16 of the MPS which provides for the consideration of proposals to permit confectionary stores by development agreement, he felt that there were overriding policies on commercial development in Part 10 of the MPS which took precedence and which restricted new commercial development along Highway No. 4 to designated areas. He felt that the policies which restrict commercial development to the designated commercial node in Area C of District 10, in his opinion would lose their priority only if the commercial node were completely developed, or if the designated commercial node were unsuitable for development, or if the MPS were amended to alter the policies on restricted commercial development along Highway No. 4. None of these situations applied, in his opinion.

Brian Spicer, Development Officer for the Municipality for 7 years, employed by the Metro Planning Commission, confirmed that final subdivision approval had been granted on June 13, 1985 for Lot 16 RC, which was a consolidation of Lots 16R and 17R previously discussed in evidence, as shown on a subdivision plan, No. 1876R by James W.P. Grant, N.S.L.S., dated June 30, 1981, and filed as Exhibit R-14. He further confirmed that Department of Transportation approval for Lot 16RC had been granted by letter dated June 4, 1985, (Exhibit R-12) and final Department of Health approval for Lot 16RC had been granted by letter dated June 7, 1985 (Exhibit R-13), and that subsequently he had issued a development permit for a local retail outlet for this property.

Douglas Foster, Executive Director of the Metro Planning Commission for 6 years, commented on the MPS process in District 10 and specifically on the policies relating to commercial development. In addition to co-ordinating and managing the MPS process, Mr. Foster was one of the two planners assigned to work with the public participation committee in Area B of District 10.

Mr. Foster said that the area of District 10 beyond the Parkdale development, where sewer service ends, is mainly characterized by ribbon development along Highway No. 4 except for Silverwood and Floral Heights residential subdivisions. He said that it had been felt that a local neighbourhood commercial area was needed for Floral Heights although on Highway No. 4 rather than in the subdivision itself. The commercial node was designated in the area of the Esso service station,an existing confectionary store and the mailboxes for Floral Heights because it was felt that fewer pedestrian traffic problems would result from a location on the same side of the highway as the bulk of the nearby residential population. Mr. Foster believed that Council's decision to refuse to enter into a development agreement to allow a confectionary store on the site owned by the Appellant was consistent with the policies of the MPS.

Douglas Grant and Walter Curren, co-chairmen of the public participation committee for Area C during the development of the MPS both gave evidence supporting the commercial node designation in the MPS and supporting Council's decision.

Mr. Grant explained that the committee had felt that Area C should retain its residential character, that existing commercial enterprises should remain and that new commercial enterprises should be clustered. The commercial node designation, he felt, was the logical solution for a number of reasons:

1. There were pre-existing businesses in the area.
2. The area had parcels of unoccupied land with frontage on Highway No. 4.
3. The area was adjacent to Floral Heights subdivision which had very few commercial services nearby.
4. Pedestrian safety would be enhanced (plans for widening Highway No. 4 were not known at the time).
5. Businesses on one side of a busy road and homes on the other did not seem to make sense.
6. If more residential development occurred, the commercial node could be expanded.

Mr. Grant concluded that Council's decision was consistent with the policies of the MPS and was "a good decision".

On the matter of Council's decision not to hold a public hearing in this application for a development agreement, Mr. Grant said that he agreed that Council should initially screen such an application and if Council determined that it was not compatible with the policies of the MPS, public hearings would be redundant. Mr. Grant believed that Council should have faith in the policies developed by citizens during the MPS process and should not now begin to "warp" the MPS.

Both Mr. Grant and Mr. Curren agreed that there had been substantial feeling in the public participation committee that there should be no additional confectionary stores and that Policy 6 of Part 16 of the MPS represented a compromise of that position, acknowledging that there may be a time in the future when circumstances have changed (the rate of development in residential areas would be a relevant factor) and Policy 6 could come into play. Mr. Grant and Mr. Curran felt that the policies of the MPS had hardly had a chance to operate yet, in the period of less than a year since its approval. If decisions were made at variance with the MPS, then the process of achieving an MPS would be discredited in District 10 and elsewhere, they felt.

Mrs. Blanche Dilney whose house is located to the west of the subject property objected to the proposed confectionary store because she felt that it would be located 15 feet from her driveway which was too close in her opinion. She said that 5 stores in the neighbourhood was too much and that the proposed confectionary store for the subject property would mean a total of 6 stores in 2½ miles.

Janis Kean, a resident of Sydney now leasing the highway variety store in the Esso service station, objected to the possible location of a convenience store on the subject property.

Counsel for the Appellant argued that the Appellant had shown that there was a need for a convenience store in the neighbourhood, that the residents of the neighbourhood are in favour of the development and that the Appellant's proposal is an acceptable one from a planning point of view in many respects. Counsel for the Appellant stated that Council's decision cannot reasonably be said to be consistent with the Municipal Planning

Strategy because "it failed to provide an opportunity for public participation as called for in the strategy and it was determined solely by Policy 5 of Part 10 of the Strategy and failed to give consideration to other equally important policies outlined in the Strategy which if given proper consideration may have inclined Council to decide in favour of the application."

Counsel for the Municipality submits that the decision of Council was consistent with the Municipal Planning Strategy and therefore it embodied the views of the public as they were expressed during the public participation process in the preparation of the MPS and as incorporated into the MPS itself.

In weighing the evidence and argument presented on behalf of the Appellant and the Municipality, the Board is to be guided by Section 72(4) of the Planning Act which states:

> "72(4) The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall
>
> (a) refer the matter back to the council; and
>
> (b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant.

The relevant policies of the MPS in this appeal are contained in Section 10 (Commercial Development) and Section 16 (Residential and Rural) of the Planning Strategy. Section 16, Policy 6 has been previously quoted on Page 10 of this decision.

The preamble in Section 10 of the MPS and Policy 5 in that Section are relevant and read as follows:

> " Commercial development is concentrated within the Kings Road area northeast of the Highway #125 By-pass, as identified on Map #5. This area is recognized as the logical place for existing and future commercial expansion for a broad range of goods and services. The existing uses now provide on-site parking within this area and this practice shall continue.
>
> LeVatte Construction Co. Ltd., an industrial use, is the only use within the Kings Road commercial designation that does not conform with the existing commercial uses. The business is well established and is unlikely to relocate.
>
> Council is restricting commercial development along Route #4 beyond the By-pass to the existing uses, as outlined in Part 16: Policies 4, and 5, and new confectionary stores outlined in Part 16, Policies 6 and 7. A small commercial node is also designated on Map #5 between Tometary Drive and the Legion on Route #4. This commercial node would serve the large residential area of Floral Heights Subdivision. It shall be the policy of Council:
>
> . . . .
>
> . . . .
>
> Policy 5 to designate one additional commercial node between Tometary Drive and the Legion, shown on Map #5 Future Land Use, to allow general retail uses, restaurants, private clubs, residential development and small scale commercial recreational establishments;"

In the opinion of theBoard, the decision of Council to refuse to enter into a development agreement is consistent with the intent of the Municipal Planning Strategy. The preamble to Section 10, Commercial Development, makes it clear that Council intended to restrict "Commercial development along Route #4 beyond the By-pass to the existing uses," although new confectionary stores could be considered by development agreement, and although a small commercial node was designated between Tometary Drive and the Legion on Route #4. The commercial node is specifically designated to "serve the large residential area of Floral Heights Subdivision". Policy 5, Section 10, designates "one additional commercial node between Tometary Drive and the Legion "....(emphasis added).

While Policy 6, Section 16 provides for the consideration of new confectionary stores by development agreement "in any part of District #10 outside the By-pass", Council is instructed to consider such proposals with regard for the following:

> "Policy 6
>
> (a) the use must primarily be intended to serve the needs of the local neighbourhood and shall be located outside the by-pass.
>
> (b) the possibility of adverse affects caused by traffic generation and parking needs:
>
> - litter
> - loitering, and
> - the visual appearance of the use in relation to the surrounding development."

Also Policy 8 of Section 10 sets out criteria to be met by "new commercial institutional or industrial uses" allowed by development agreement, pursuant to Policies 4, 5 and 6 of Section 16 as follows:

> (a) the agreement shall not allow a negative impact on neighbouring properties;
>
> (b) the use must not cause any odour, sound or vibration which has a potential to be a nuisance to neighbours;
>
> (c) the use must not be a private club, tavern, beverage room or cabaret;

(d) the use must not be a use which involves the obnoxious discharge of chemicals or similar matters which would endanger the quality or quantity of water flowing into Sydney River or endanger the quality or quantity of ground water to existing neighbourhood wells;

(e) the use must be visually in keeping with a rural residential environment;

(f) the use shall not have potential for creating a safety hazard to neighbouring uses or the travelling public by reason of bulk storage, manufacture or processing of taxic or dangerous chemicals or substances;

(g) the use shall not create hazardous traffic situations.

The Board heard evidence relating to several of the enumerated factors which Council is required to take into consideration when evaluating a proposal for a new confectionary store pursuant to Policy 6, Section 16. The Appellant himself stated that he expected that 30% of his anticipated business would come from the local area and 70% from "highway traffic". His proposal then, is not "primarily intended to serve the needs of the local neighbourhood". "Traffic generation" and "hazardous traffic situations" were concerns expressed by both planners and by citizens who lived in the area and had been involved in the development of the MPS.

In the opinion of the Board, the MPS policy statements clearly indicate an intent to restrict commercial development on Highway No. 4 except in a designated commercial node intended to serve the Floral Heights residential subdivision. It would not be consistent with the policies of the MPS for Council to enter into a development agreement to allow a new confectionary store directly opposite one of the 3 access roads to the Floral Heights subdivision when the designated commercial node - adjacent to the subdivision and on the same side of the highway - exists only 1000 feet away and has not been fully utilized. Notwithstanding the possibility for approval of a new confectionary store by development agreement as provided for in Policy 6, Section 16, the Board determines that it should not interfere with the decision of Council to refuse to enter into a development agreement to locate a new confectionary store as proposed by the Appellant on the subject property.

With regard to the argument by Counsel for the Appellant that Council's decision cannot reasonably be said to be consistent with the MPS because it failed to provide an opportunity for public participation as called for in the MPS, the Board has considered the policies in Part 17 of the MPS, entitled "Public Participation Program", and the relevant sections of the Planning Act, and determines that there was no necessity for a public hearing on this application.

Part 17 of the MPS states:

> " In accordance with Section 60(2) of the Planning Act, and in addition to the statutory requirements under the Planning Act, it shall be a policy of Council to further inform the public of an application to amend a Land Use By-law or enter into a development agreement to the following manner:

1. to insert in the first required advertisement, a notice of an informal public meeting to be held at a Planning Advisory meeting scheduled prior to the public hearing;
2. to require a notice to be sent by ordinary mail to all assessed owners within 150 metres of the subject site where the amendment is not a general text amendment. This notice shall state a general description of the amendment, the time and place of the informal meeting and formal Public Hearing;
3. to require the applicant to pay all costs incurred in accordance with Section 61, Subsection (3) and (4) of the Planning Act."

Section 60(2) of the Planning Act states:

> "60(2) A land-use by-law may require that affected property owners be notified of proposed amendments to the land-use by-law, and for that purpose the by-law shall
>
> (a) identify the class or classes of amendments to the land-use by-law which would require notice to be given to "affected property owners";
>
> (b) provide that an "affected property owner" is the assessed owner, unless the by-law otherwise defines "affected property owner" for this purpose; and
>
> (c) provide that the notice required is to be served personally, by ordinary mail or by certified mail."

On an application to amend a land-use by-law Council may hold a public hearing after advertising such a hearing as required in the procedure for adopting an MPS set out in Section 42 of the Planning Act. Alternatively Council may refuse to hold a public hearing on an application to amend a land-use by-law and an appeal may be filed with the Board within 21 days of the date of such a decision by Council. Council does not have to advertise such a decision not to hold a public hearing. The application may be deemed to be refused pursuant to Section 62, which states:

> " If a council has not, within one hundred and twenty days after receipt of a completed application to amend the land-use by-law, commenced the procedure required under Section 61 for amendment to the land-use by-law by publishing the required advertisement, the application is deemed to have been refused."

Approval by Council of a development agreement must be by resolution (Section 66(1) of the Act) and the procedures set out above in Section 60, s.s. 2 - 5 and Section 61, s.s. 1 - 4 for the amendment to a land-use by-law apply to such a resolution approving a development agreement. Section 61(1) makes reference to Section 42 of the Act. Section 61(1) states:

> " Any person may apply to amend a land-use by-law and subsections (1), (2) and (3) of Section 42 apply mutatis mutandis to the amendment."

Section 42 states:

> "42(1) Before adopting a planning strategy a council shall hold a public hearing at which oral and written submissions are received.
>
> 42(2) The council shall cause notice to be given of the public hearing and of its intention to adopt a planning strategy by an advertisement inserted at least once a week for two successive weeks in a newspaper circulating in the planning area, the first of such notices to be published at least twenty-one clear days before the date fixed for the hearing.
>
> 42(3) The notice of the public hearing shall state the place where and the hours during which the proposed planning strategy may be inspected by the public and the date, time and place set for the public hearing."

In summary, the Planning Act provides that Council may deal with an application for a development agreement in two ways. Council may approve the entering into of an agreement by resolution provided that the mandatory provisions for holding a public hearing and the advertising of the public hearing come into play, pursuant to Section 61. Additional notice to affected property owners may be required, pursuant to Section 60(2), if so provided for in the Municipality's Land-use By-law.

Alternatively, Council may refuse to approve a development agreement. Only if Council intends to consider the approval of a development agreement do the Sections requiring a public hearing following advertised notice apply (Section 61, s.s. 1-4). Only if Council intends to consider the approval of a development agreement, thereby requiring a duly advertised public hearing, would the provision of mandatory notice to affected property owners, if required by the Municipality's Land-use By-law, come into play.

To return to Part 17 of the MPS for District 10 of the Municipality of the County of Cape Breton: the 3 policies set out do not apply if Council has refused to enter into a development agreement. There is no "required advertisement" if Council refuses to approve the entering into of an agreement. Notice by mail to assessed owners within 150 metres of the subject site as set out in Part 17, is for an "amendment" (to the Land-use By-law) not for approval of a development agreement. And finally, Section 61 of the Act only applies if Council intends to consider the approval of a development agreement.

Furthermore, Section 60(2) of the Act provides for notice to affected property owners if so provided for in the Land-use By-law. The policies on public participation in Part 17 of the MPS for District 10 are not reflected in Part 45 of the Land-use By-law which concerns development agreements. In the opinion of the Board the intent of Part 17 of the MPS has not been made effective by incorporation in the Land-use By-law.

The Board having considered the evidence and argument in this appeal, having visited the site and having studied the relevant policies of the Municipal Planning Strategy and the Planning Act, and for the reasons stated, determines pursuant to Section 72(4) of the Act that it will not interfere with the decision of the Council of the Municipality of the County of Cape Breton made May 21, 1985, which refused approval for a development agreement to allow the construction of a convenience (confectionary) store on lands of J. Terrance Robertson in Howie Centre.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 5th day of February, A.D., 1986.

E A Salton

ELIZABETH A. SALTON
Vice-Chairman

Brown et al. v. City of Halifax

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT 116-UNIT APARTMENT BUILDING--"INTERESTED PERSON"--"AGGRIEVED PERSON"--LOT CONSOLIDATION--"SUBDIVISION"--LACK OF JURISDICTION--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--HALIFAX CITY CHARTER, SS. 533, 540--INTERPRETATION ACT, SS. 6(1)(y), 8(1),(5), 22, 23--MUNICIPAL BOARD ACT, S. 28--PLANNING ACT (1969), SS. 1(i), 12, 33(2)(b), 35(1), (2)--PLANNING ACT (1983), SS. 3(r), 35, 36, 37, 38(2)(p)(i), 55(1), 66(1), 67(1), 68, 71, 96(1), 103, 113, 118, 119, 120(3)--CITY OF HALIFAX MPS, SECTION 2 POLICIES 1.1, 1.1.1, 1.3, IMPLEMENTATION POLICY 3.2.1

This is an appeal from two decisions of the Council of the City of Halifax. One decision was made on Oct. 14, 1982 and approved a development agreement which would permit the construction of a 116-unit apartment building on Charles St. between Gottigen and Creighton Streets in the north end of peninsular Halifax. The subject site is zoned R-3, consists of eight to ten lots containing .93 acres and is covered by a Municipal Development Plan, now known as a Municipal Planning Strategy (MPS). The second decision, on Oct. 20, 1982, approved a lot consolidation of this land.

HELD: The appeal is allowed and the contract development proposal is rejected.

The decisions under appeal were made by Council, and the appeals herein were commenced, under the provisions of the old Planning Act (1969). Despite its repeal and the substitution of a new Planning Act in 1983, the test to be applied with respect to the standing of the Appellants to maintain this appeal is that of "interested person" within the meaning of the old Planning Act, rather than that of "aggrieved person" under the new Act. All the Appellants here are "interested persons". In the event that the test is "aggrieved person" under the new Planning Act, then the Appellant Brown alone, whose residence is in close proximity to the subject lands and who would necessarily suffer pecuniarily, qualifies as an aggrieved person. The Board has jurisdiction to hear the appeal on its merits.

On the appeal of the lot consolidation, the old Planning Act was silent. However, an appeal from Council's decision could be made under s. 540 of the Halifax City Charter to the County Court for District Number One. Under the new Planning Act a lot "consolidation" is included in the definition of "subdivision" in s. 3(r). However, under the new Act, subdivisions are dealt with by development officers and can only be appealed by Applicants. Under neither the old nor new Planning Acts does the Board have jurisdiction in this case to hear the lot consolidation appeal.

On the merits of the development agreement appeal, the Board must determine whether the decision of Council cannot reasonably be said to carry out the intent of the Municiapl Development Plan (MDP). In making this determination the Board can and must consider evidence of events leading to the decision of Council and all relevant legislation, including alleged illegalities, although the Board cannot give prerogative remedies. The requirement that Council approve a "specific development" is adequately met if the general scheme requested, refined in staff reports, and publicly displayed in advertisements and in Council debates, culminated in a resolution by Council approving the general outline of the scheme. This interpretation ensures that applications are processed in accordance with a workable and sensible practice. While these factors assist the Board in determining consistency with the MDP, more particular remedies may require an application to a superior court for a prerogative remedy. The burden is on the Appellants to demonstrate that Council has not reasonably carried out the intent of the MDP. The Board can look at all of the evidence before it, not just that adduced by the Appellants. Policy 1.1 of the MDP relates to the adequacy of existing or presently budgeted services. Here traffic is insignificant in relation to the total traffic near the site. On-site parking and open space were sufficient, as was buffering of adjacent properties. Population density is higher than R-3 "as of right" density, but not so high as to violate the intent of the MDP. The most important factor here is the mass of the proposed development. Staff originally rejected a 120-unit development, then approved a 116-unit proposal and finally requested the Applicant to reduce the size to 108 units. In all of this the envelope of the building and coverage of the lot has not really been reduced. The original rejection was because there were too many "high rises" in the area. Later staff said the subject high rise should be accepted because of the precedents set by the high rise buildings already there. The Board's opinion is that the proposed high rise development is not compatible with the neighbourhood because it is too massive in scale and too high in comparison with the existing old residences and the modern multi-family residences in the area. The Board makes this finding after giving due weight to the need for more residential apartment units in the City. The decision of Council cannot reasonably be said to be consistent with the City's MDP. The Board is authorized to make any decision Council could have made. Council could have rejected this development ab initio and the Board therefore allows this appeal and rejects the proposal.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1969, c. 16, as amended;

- and -

IN THE MATTER OF: An Appeal by **ETHEL BROWN, JOHN LANGAN, CHRISTOPHER FYLES, STEPHEN LEACH, KIM GOODSON, VERITY LEACH, ROBIN MOREHOUSE, LOUANNE MOREHOUSE, ALINE BOURGEOIS, JOHN GARDNER, JAMIE MUNROE, DEBBIE MUNROE, GARY FARMER** and **MAXINE FARMER** from decisions of Halifax City Council rendered October 14, 1982, and October 20, 1982, permitting the construction of a 116 unit apartment building on and immediately north of Charles Street between Gottingen Street and Creighton Street and for consolidation of certain lots to accommodate such construction.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: E. ANTHONY ROSS, LL.B., for the Appellants,

J. WALTER THOMPSON, LL.B., and MICHAEL ARGAND, LL.B., for the Applicants,

WAYNE ANSTEY, Q.C., for the City of Halifax.

DECISION

This is a planning appeal (see the heading for details) commenced by Notice of Appeal signed by E. Anthony Ross, solicitor for the Appellants listed in the heading above and dated October 12, 1982, and directed to the Nova Scotia Municipal Board, City of Halifax, and Michael Argand, solicitor for Gordon Argand and Rose Argand.

The lands in question, hereinafter called "the lands", owned by Gordon and Rose Argand, the Applicants,

are situate in the north end of the Peninsula of Halifax. The lands are within a block bounded by North, Gottingen, Creighton and Charles Streets and consist of eight to ten lots containing in all .93 of an acre. The lands lie to the south end of that block and are roughly bounded on three sides by Creighton Street, Charles Street and Gottingen Street. About mid-way between Creighton and Gottingen Street, the lot of the Appellant Brown (rectangular in shape approximately 50 feet by 50 feet) fronts on Charles Street and is bounded on three sides by the lands. This Brown lot contains the personal residence of the Appellant, Mrs. Ethel Brown. The lands of Milton Crosby (and his residence) are situate immediately "north" of the lands on Creighton Street and are on a small city lot. All these properties are located with sufficient precision for the purpose of this decision on Exhibit 10, Sketch 1, Page 7, where the division of the lands into various lots is graphically shown.

At the hearing of these appeals which commenced Tuesday, December 10, 1985, at 10:00 a.m. and continued December 11th, 12th and 16th, at the hearing room of the Expropriations Compensation Board, Centennial Building, Halifax, the Appellants' counsel called, under subpoena, the witnesses Gordon Argand, Rose Argand, Barry D. Woodworth, Robert Grant, Edward A. Kerr and John Heseltine. He also called Alex Halse, Christopher Fyles (one of the Appellants) and Milton Crosby. The Applicants called Richard Kassner and counsel for the City called William Campbell. No rebuttal evidence was called.

Gordon Argand, one of the Applicants, testified he was the husband of Rose Argand, the other Applicant, that between them they were the owners of the lands. He testified he had given full power of attorney to his son Michael Argand, (one of the counsel for the Applicants present at the hearing) to deal with the land and to develop the same. He said his health was not good, that Michael understood the agreement and had the duty of developing the lands. Mr. Gordon Argand was very vague as to the present state of the lands, their occupancy, the nature of structures, if any, on the lands and the rents derived from any tenants on the land.

His wife, Rose Argand, testified in the same vein as her husband and confirmed the delegation of the development function in the lands, both from herself and her husband, to their son, Michael. She stated that she did this because her husband's health was poor. She knew precisely those details concerning the lands of which her husband had been vague.

Barry D. Woodworth, Assistant Director of Assessment, Halifax City Assessment Region, proved that the Applicants or at least one of them, were the assessed owners of most of the lands at the time of the Council decision and, by the time of the hearing of the appeal, were the assessed owners of the lands.

Robert Grant, Director of Development for the City of Halifax, pursuant to subpoena, produced his department's file on the development agreement. This file was case number 4125 from the city records. After extensive questioning, it appeared he had not been familiar with the file prior to receiving the subpoena, and had not made himself familiar with the file subsequent to receiving the subpoena. He identified those persons in his department who had handled the development application and brought before the Board the entire contents of the file concerning that application. Parts of the contents of the file were either adduced through various witnesses into evidence as individual exhibits, or turned over by Mr. Grant to the custody of one of his co-employees, Mr. William Campbell, for continued safekeeping.

In the absence of Gladys I. Blennerhassett, City Clerk, who was ill, Edward A. Kerr, Deputy Clerk of the City of Halifax provided the Board with the papers which were presented to City Council prior to its decision on the development agreement. He outlined the duties of the City Clerk's department in the development agreement approval process.

John Heseltine, a Planner from Mr. Grant's department, said that his department no longer kept a file on this development agreement even though the development agreement appeal had not been heard and the building approved had not yet been constructed. He qualified himself before the Board as a planner entitled to give opinion evidence in the matter of planning within the City of Halifax.

Alex Halse was qualified by the Board, at the request of counsel for the Appellants, as an architect entitled to give expert architectural evidence within the Province of Nova Scotia including the City of Halifax. He said he had reviewed the decision of the Council and the relevant legislation leading up to the development agreement here appealed. He attempted to apply the open-space definitions to the drawings put before him but he admitted in cross-examination to a gross misinterpretation of the requirements of the City open-space legislation which of course affected his density calculations as well. He was of the opinion that the massive construction contemplated in the development agreement was out of proportion to the other uses in the neighbourhood and would overpower the neighbourhood.

Of the fourteen Appellants in this matter, Christopher Fyles was the only Appellant who testified at the hearing before the Board. In summary, he expressed his concern aroused by the overpowering nature of the proposed development in the neighbourhood. He owns property, 2577 Creighton Street, located several lots to the north of the lands. He felt that the buildings contemplated under the development agreement would be overpowering in the neighbourhood and out of context with the neighbourhood. He conceded that the existing buildings on the lands were in a dilapidated condition and not suitable, economically, for rehabilitation.

He felt that the development on the lands could be done in line with the development he had made on his own lands and as others had done in the general neighbourhood of the lands. He felt that the various high rise buildings, Northwood Manor and the like, located in the subject area were not a good criterion of what should be built in the neighbourhood.

Mr. Milton Crosby owns the property immediately north of the lands on Creighton Street. He bought that property when it was assessed at around $12,000.00. He has improved his property and it is now assessed at $22,500.00. He believes that the buildings on the lands were dilapidated and ought to be redeveloped. He testified that the proposed building will overwhelm his dwelling, in particular, and will reduce its economic value. He said he would accept an as-of-right development of the lands and he felt that the lands should be redeveloped but not in the overpowering way proposed. He said that on-street parking was already a problem in the area apparently aggravated by the lack of parking for the visitors to the inhabitants of Northwood Manor.

Richard Kassner, the Applicants' architect for this development project, was qualified before the Board to give expert evidence as an architect and he testified to his extensive experience in residential design and construction and residential restoration, particularly within the City of Halifax. He dealt in detail with the development agreement and the procedures of planning and design leading up to the decision of Council. He was of a firm opinion that the City Council decision was within the intention of the M.D.P. and that the subject development was an appropriate development for the subject lands within the M.D.P.

Counsel for the City called William Daniel Campbell, a Planner II, employed in the Planning Department of the City of Halifax. He qualified himself before the Board as a planner entitled to give opinion evidence concerning planning in the City of Halifax. He reviewed the entire process leading up to the lot consolidation and leading up to the development agreement. The Board finds his evidence succinct and was impressed by his carefully considered answers. His opinion was that the decision of City Council here appeared to him to be consistent with the intent of the M.D.P. of the City of Halifax.

The Notice of Appeal was received by the Board on November 12, 1982 and purports to appeal:

> "1. The decision of City Council made October 14, 1982, approving the application of Gordon Argand and Rose Argand for the "construciton" (sic) of 116 unit apartment building in Block A Charles Street, Halifax; and
>
> 2. The decision of City Council of October 20, 1982, which decision approved the application of Gordon Argand and Rose

Argand for a lot consolidation of land in the area aforementioned to accommodate the construction as given in the application for contract zoning."

(The two decisions above are hereinafter called "decisions of Council".)

In the Notice of Appeal the grounds of appeal are as follows:

> "1. The decision of City Council failed to carry out the intent of Municipal Development Plan of the City of Halifax in particular, but not so as to limited [sic] the generality of the foregoing, the said development contract and lot consolidations are inconsistent with the objectives and policies of the Municipal Development Plan: Part II, Section 1; Part II, Section 2, Policy 1.1, 1.1.1, 1.2, 1.3, 1.4, 1.4.2, 1.5, 1.5.2, 1.7, 1.8, 8.3, 8.4, 8.6.6, 9.2, 11.5, and in general the established policies of the Planning and Development Departments of the City of Halifax with particular reference to the residential environment objectives which have been established practiced and now codified in the Draft Pennisula North Detailed Area Plan."

An Amended Notice of Appeal, filed at the request of the Board, dated December 8, 1982, signed in the same manner, addressed to the same recipients and delivered to the Board on that date, contained essentially the same grounds of appeal. Both Notice and Amended Notice of Appeal were made pursuant to the Planning Act, S.N.S. 1969, as amended (hereinafter called the old Planning Act). The old Planning Act was in force in Nova Scotia until its repeal and substitution by the Planning Act being Chapter 9, S.N.S. 1983, as amended (hereinafter called the new

Planning Act) which was fully proclaimed 6-8-84.

The relevant portions of the old Planning Act (at the time the Council's decisions were made) are Section 33(2)(b) which reads as follows:

> "(b) where the municipal development plan so provides, provide that the council may by resolution approve any specific development requested which would not otherwise be permitted by the by-law, but no approval shall be given inconsistent with the municipal development plan;"

and the provisions for appeal of a decision of Council made under a by-law made under those sections of that statute are set out in Section 35(1):

> "The Director or any interested person may within thirty days of the decision of the council under a by-law made pursuant to clause (b) or (c) of subsection (2) of Section 33 appeal to the board and the decision of the board shall be final."

The Board, at any time until the proclamation of the new Planning Act, on deciding an appeal, would have had reference to the old Planning Act, Section 35(2) which states:

> "The board may:
>
> a) confirm the decision of the council or make any decision the council could have made; or
>
> b) refer the matter back to council for further consideration."

The contract development appeal, at the time of Council's decisions, could be commenced and prosecuted by "any interested person".

After a long delay (for reasons not the fault of the Board), the Board heard this appeal at sittings at Halifax commencing December 10, 1985. In the interval between the commencement of this appeal and the commencement of its hearing, the old Planning Act had been repealed and the new Planning Act had been substituted therefor. Section 119 of the new Planning Act in force at the time of the hearing states:

> "Proceedings before the Board in respect of matters to which provisions of Chapter 16 of the Acts of 1969 repealed by this Act or repealed by proclamation apply shall be continued in conformity with the provisions of this Act as far as consistently may be."

Section 118 of this new Planning Act also relates to the appeal and its text is in full:

> "In the event of conflict between this and any other Act, the provisions of this Act shall prevail."

The new Planning Act provides for a "development by agreement". In its text the old Planning Act provided for "an agreement with the Council...". In this decision, the words "development agreement" will be used to describe the transaction appealed regardless of the context of which of the Planning Acts the words are being used:

Under the New Planning Act the applicable sections providing authority for the making and the appealing of development agreements are as follows:

Section 38(2)(p)(i):

"policies governing

(i) the use of development agreements in accordance with Section 55", and

Section 55(1):

"Policies adopted by a council pursuant to clause (p) of subsection (2) of Section 38 to provide for development by agreement shall identify matters that the council shall consider prior to the approval of an agreement and the developments that are subject to agreement", and

Section 66(1):

"A council shall approve the entering into of an agreement under Section 55 or 56 by resolution", and

Section 67(1):

"An agreement pursuant to Section 55 or 56 may contain terms with respect to

a) matters that a land-use by-law may contain under Sections 53 and 54;

b) hours of operation;

c) maintenance of the development", and

Section 68:

"An agreement pursuant to Section 55 or 56 shall not be entered into until

a) the time for appeal has elapsed;

b) any appeals have been disposed of and the resolution has been affirmed by the Board."

A development agreement entered into under the new Planning Act may be appealed pursuant to Section 71:

"(1) Where a council has approved the entering into of an agreement pursuant to Section 55 or 56, the decision of the council may be appealed by

(a) an aggrieved person;

(b) the Director;

(c) the council of an adjoining municipality.

(2) An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the advertisement giving notice of the decision of the council to enter into the agreement.

(3) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy.

(4) The Board shall

(a) confirm the decision of the council;

(b) make any decision the council could have made; or

(c) refer the matter back to the council for further consideration.

(5) The Board shall not interfere with the decision of the council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy.

(6) The Board shall not make any decision pursuant to clause (b) of subsection (4) which commits the council to make any expenditures with respect to the development."

Thus it can be seen that if this appeal were to be determined pursuant to the substantial provisions of the new Planning Act, two major changes would have occurred, not necessarily to the benefit of the Appellants:

1. Under the new Planning Act, the Appellants, or at least one of them, would have to

qualify themselves as "aggrieved persons" in order to give the Board jurisdiction to hear this appeal.

2. The test the Board would have to apply to Council's decision, arguably, would be stiffer under the new Planning Act than under the old Planning Act. The new Planning Act is framed in the negative and the Board is instructed under the new Planning Act not to interfere with a decision of Council unless the decision cannot reasonably be said to be consistent with the Municipal Planning Strategy (M.P.S.). It is thus seen that for the development agreement appeals between the two statutes, the change of legislative intent has narrowed the class of persons who may qualify as Appellants and, arguably, has restricted in some way, because of changes in wording, the scope of the tests the Board may apply to decisions of Council.

The Halifax Municipal Development Plan under the old Planning Act (Part 3, Section 12 and following) becomes the "new" M.P.S. under the new Planning Act (Section 3(n),) Section 35, Section 36, Section 37 and Section 38 of the new Planning Act. For the purposes of the appeal, this is a distinction without a real difference or difference without a real distinction and elsewhere in this decision the phrase "Municipal Development Plan" will mean both that and the newer Municipal Planning Strategy and will be abbreviated M.D.P. The transition from the "old" M.D.P. to the "new" M.P.S. is dealt with under Section 113 of the new Planning Act:

> "A municipal development plan and zoning by-law passed under the former Planning Act are and are deemed to be a municipal planning strategy and land-use by-law, respectively, within the meaning of this Act, to the extent to which they are consistent with this Act."

The Board has also looked to the Interpretation Act for guidance in its determination of what sections of which Planning Act to apply to the facts of this appeal.

The Interpretation Act contains the following sections helpful to the Board in deciding this Appeal:

> "Section 6(1) In this Act and in any other enactment:
>
> ....
>
> (y) "repealed" includes revoked or cancelled, expired, lapsed, or otherwise ceased to have effect", and

Section 8(1):

> "The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning." (emphasis added), and

Section 8(5):

> "Every enactment shall be deemed remedial and interpreted to insure

the attainment of its objects by considering among other matters:

a) the occasion and necessity for the enactment;

b) the circumstances existing at the time it was passed;

c) the mischief to be remedied;

d) the object to be attained;

e) the former law, including other enactments upon the same or similar subjects;

f) the consequences of a particular interpretation;

g) the history of legislation on the subject," and

Sections 22 and 23:

"22(1) Where an enactment is repealed, the repeal does not:

a) revive any enactment or provision of law that was repealed by the enactment or prevent the effect of any saving clause contained in the enactment;

b) affect the previous operation of the enactment so repealed or anything duly done or suffered under it;

c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment;

d) affect an offence committed against or a violation of the provisions of the enactment, or any penalty, forfeiture, or punishment incurred under the enactment;

e) affect an investigation, legal proceeding or remedy concerning any right, privilege obligation, liability, penalty, forfeiture or punishment acquired or incurred under the enactment.

(2) An investigation, legal proceeding or remedy, of the kind described in clause (e)

of subsection (1) may be begun, continued or enforced as if the enactment had not been repealed.

(3) Where an enactment is repealed and other provisions are substituted for it:

a) every person acting under the enactment shall continue to act as if appointed under the provisions so substituted until another is appointed in his stead;

b) every bond and security given by a person appointed under the enactment remains in force, and all offices, books, papers and things made or used under the enactment shall continue to be used as before the repeal as far as consistent with the substituted provisions;

c) every proceeding taken under the enactment shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;

d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or in a proceeding in relation to matters that have happened before the repeal, the procedure established by the substituted provisions shall be followed as far as it can be adapted thereto;

e) when any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions so substituted, the penalty, forefeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly.

23(1) Where an enactment is repealed and other provisions are substituted by way of amendment, revision or consolidation:

a) all regulations made under the repealed enactment remain in force, in so far as they are not inconsistent with the substituted enactment, until they are annulled or others made in their stead;

> b) a reference, in an unrepealed enactment to the repealed enactment, shall, as regards a subsequent transaction, matter or thing, be read as a reference to the provisions of the substituted enactment relating to the same subject-matter as the repealed enactment; but where there are no provisions in the substituted enactment relating to the same subject-matter, the repealed enactment shall be read as unrepealed as far as is necessary to maintain or give effect to the unrepealed enactment.
>
> (2) Where an enactment of any other province or territory of Canada or of Canada is repealed and other provisions are substituted by way of amendment, revision or consolidation, a reference in an enactment of Nova Scotia to the repealed enactment is, as regards a subsequent transaction, matter or thing, a reference to the provisions of the substituted enactment relating to the same subject-matter as the repealed enactment."

All these sections have application to the question the Board must first determine, namely, which sections of which Planning Act are in effect for the determination of the development agreement appeal herein and perhaps, even, for the determination of the other (lot consolidation) part of the appeal.

Counsel for the City, with concurrence at the hearing of counsel for the Applicants, submitted that the Board should interpret these statutes so that the jurisdictional status of parties test of "interested persons" of the old Planning Act apply to at least one of the Appellants rather than the jurisdictional status test of "aggrieved persons" under the new Planning Act.

Section 119 of the new Planning Act requires "proceedings before the Board...[shall continue]...in conformity with the provisions of the Act as far as consistently may be." Counsel for the City argued that this Section deals with the conduct of proceedings before the Board only, that the Sections of the Interpretation Act, Section 22(1)(c) and Section 22(2) prevail, and since there was no conflict between that interpretation statute and the new Planning Act, Section 118 of the new Planning Act could not be invoked to import the new Planning Act into these proceedings either to test the planning merits of the appeal or to test the status of the Appellants.

By the time post hearing briefs were to be filed, (January 13, 1986) counsel for the Applicants had retreated from their previous acceptance of the City of Halifax position and now argued in their post-hearing memorandum as follows:

> 1. That, as to status, the new Planning Act applied and that for the Board to have jurisdiction in the appeal one or more of the Appellants must be established on the evidence as an "aggrieved person"; that on the evidence none of the Appellants were proved to be an "aggrieved person" within the meaning of the new Planning Act and therefore the Board no longer had jurisdiction to hear the appeal on its planning merits. Counsel for the City in his post-hearing memorandum (hereinafter called memorandum) reiterated his previous support for "interested

person" under the old Planning Act as the necessary status of an Appellant in order to give jurisdiction to the Board to hear this appeal on its planning merits. He went on to argue that if he were wrong in that interpretation of the applicable statute, then there was insufficient evidence to show any of the Appellants to be an "aggrieved person" under the new Planning Act and therefore, and in that eventuality, the Board would have no jurisdiction to hear the appeal on its planning merits.

Counsel for the Appellants argued that the test of status of an Appellant was that of "interested party" under the old Planning Act and that many, if not all, of the named Appellants qualified under that description, and therefore the Board had jurisdiction to hear the appeal on its planning merits. Alternatively, he argued that, if his submission were incorrect, that one or more of the named Appellants had been proven to be an "aggrieved person" under the new Planning Act and therefore, in either eventuality, the Board had jurisdiction to hear the appeal.

2. That in checking on the Board's ability to review Council's decision that it made no real difference which statute applied (either the new Planning Act or the old Planning Act).

This Applicants' argument is rather ungrammatically expressed on page 2 of their memorandum: "For some issues before the Board in this appeal, there is no consequence for the legislative intent [is the same]. With regard to the discretion given the Board to interfere with a decision of Council, for example, there is no meaningful difference in the legislation." On reading the Applicants' brief, other than on the issue of "aggrieved persons", the Board, rightly or wrongly, seems to detect a theme that the new Planning Act applies herein, and the old Planning Act does not, but that, regardless and subject to the "aggrieved person" issue supra [which the Applicants argue falls clearly within the new Planning Act], the Applicants would succeed in having this appeal dismissed in any event. In his memorandum, counsel for the City disagrees with the Applicants' position. On page 6, he argues that the correct legal position is "...that in fact to the extent the issue is relevant, the provisions of the old Act apply." Counsel for the Appellants argues either, or both, Planning Acts but shows a preference for the old Planning Act. The Board adopts and agrees with the arguments of counsel for the City and therefore the tests of status of appellants and of the tests to be applied to the decisions of Council by this Board respecting the approval of the development agreement in question will be the tests set out under the old Planning Act. The procedures in the present appeal subsequent to the proclamation of the new Planning Act, (having regard to the provisions of Section 119 of the new Planning Act) have been in conformity with the new Planning Act but the substantial matters, in all justice, and in order to preserve the greater rights of the Appellants under the old Planning Act, must follow the provisions of the old Planning Act.

"Interested persons" was the operative phrase under the old Planning Act. In Heritage Trust et al v. P.P.A.B. (1981) 50 N.S.R. (2d.) 352, Cowan, C.J. T.D. said all that can be usefully said on the meaning of "interested party" under the old Planning Act at page 373 of this decision: "The Board, apparently, takes the view that if any person is interested enough to file an appeal, that is sufficient for its purposes." Cowan, C.J.T.D. did not, in Heritage, disagree with that position and the Board is not too likely, at this late stage, to disagree with Cowan, C.J.T.D. All the appellants meet the test of "interested party", as set out in Heritage. If this Board were wrong, and the new Planning Act test of "aggrieved person" applied in this case, then it must agree with counsel for the Appellants when he argues on page 3 of his brief that "Mr. Milton Crosby, who gave evidence may be said to be aggrieved, is not a party." Crosby, of course, did not authorize or file an appeal. The Board also agrees with most of the Applicants' counsel's argument when he argues that the evidence shows Mr. Christopher Fyles, though a party, is not an aggrieved person within the meaning of *Riverlake Residents Association* v. *Municipality of the County of Halifax NSMB-448-84-P; Douglas Benedict* v. *The Town of Truro NSMB-475-85-P;* and *Fournier et al* v. *Municipality of the County of Halifax NSMB-474-85-P*. With the possible exception of the Appellant, Ethel Brown, there is insufficient evidence for the Board, had it a duty to categorize, to find any of the Appellants "aggrieved persons" within the meaning of the new Planning Act. *Fournier* (supra) defines at least three classes of Appellants under the new Planning Act:

1. Those Appellants who gave evidence and qualified themselves as aggrieved persons;
2. Those Appellants who did not give evidence and concerning whom there was insufficient evidence from other sources to qualify them as "aggrieved persons"; and
3. Those Appellants who did not give

evidence but concerning whom there was sufficient evidence from other sources to qualify them as aggrieved persons.

Mrs. Brown did not fall within the class (1) as she did not give evidence. If she did not fall within class (3) supra, and if the test of qualified appellants in this appeal were that of "aggrieved persons" under the new Planning Act, then this appeal would fail because of lack of jurisdiction in the Board. In Fournier, (supra) at page 46 of the filed decision as to the third class of Appellant, the Board had this to say: "With some hesitation the Board recalls its view of the site, the photographs tendered, the proximity of the Fudge lot to the subject property and the fact that Mr. Fudge and his Wife had signed the Notice of Appeal and deduced from those facts that the Fudges were also aggrieved persons since they had suffered pecuniarily and therefore are appropriate Appellants before the Board." In the next paragraph of Fournier, the Board states: "the Appellants Brown, Gerlitz and Boutilier gave no evidence before the Board: There was no other evidence adduced sufficient to enable the Board to determine whether or not they were aggrieved persons within the meaning of the statute. The burden is on each Appellant to prove his status as an aggrieved person in [on] the evidence adduced, these people are not qualified Appellants since they have not been proved to be aggrieved persons." In the Fournier case not much hung on whether some Appellants fell within categories (2) or (3) supra as some of the Appellants, at least, had fallen within category (1) and therefore the appeal was properly before the Board. In the instant case, on the evidence, Mrs. Brown is the only Appellant who may qualify as an "aggrieved person". To do so she would only qualify under category (3) outlined in Fournier.

In the instant case, as in Fournier, the Board viewed the site, the Board had photographs and drawings and plans to view, and it notes, in this appeal, as in Fournier, the close proximity of the Brown residence to the subject lands. Mrs. Brown had authorized the commencement of this appeal. From these facts the Board was able to deduce that Mrs. Brown would necessarily suffer pecuniarily from the building that could result from the development agreement. Again, as in Fournier, "with some hesitation", if such a finding were necessary, the Board would be prepared to find the Appellant Brown an "aggrieved person" within the meaning of the new Planning Act. In summary, the Board restates the test to be applied in this case as that of "interested person" within the meaning of the old Planning Act and that all Appellants here are "interested persons": In the event that the test is "aggrieved person" under the new Planning Act, then the Appellant Brown alone qualifies as such aggrieved person on the facts and evidence before the Board and, in either event, of course, the Board would have jurisdiction to proceed to hear the appeal on its planning merits.

The Notice of Appeal (and the Amended Notice of Appeal) also appeals to the Board the decision of Council made October 20, 1982, approving lot consolidation, which lot consolidation was a concomitant of the decision to approve the development agreement. The lands to be developed under the development agreement were subdivided into eight or more parcels and, if not consolidated into one lot, the proposed building, when built, would have encroached upon or would have had to have been built over several building lines. Counsel for the City, at the inception of this hearing, objected to the Board's jurisdiction to hear the portion of this appeal on lot consolidation on the grounds that the Board had no jurisdiction to hear the lot consolidation appeal since the appeal on lot consolidation lay only to the County Court for District Number One. He further submitted the Board should hear no evidence relating to the lot consolidation. The Board reserved decision on the first point and, on the second point, felt, and feels, that evidence relating to lot consolidation could easily be relevant (as well) to the portion of the appeal related to the development agreement decision which all parties present agreed was properly before the Board on appeal. The process of lot consolidation (or perhaps even the duty of City Council to consolidate the lots) was provided for, in 1982, in Section 533 of the Halifax City Charter. Section 540 of the Halifax City Charter provides, inter alia, that the appeal from City Council's decision under Section 533 of the City Charter lies to the County Court for District Number One. The old Planning Act was silent on (and made no specific provisions for) lot consolidation so at the time of the Council's decision consolidating the subject lots, City Council's power to consolidate the lots flowed from Section 533 of the Halifax City Charter. The Provincial Planning Appeal Board ruled on this point in Provincetown v. City of Halifax (1974) 4 P.P.A.B. 273. At page 277 of that decision the P.P.A.B. says "in this appeal it is the opinion of the Board that the approval of the City of a gathering together of three existing lots into one lot is a consolidation of the lots and is not a subdivision within the definition of subdivision set forward in the Planning Act as quoted above." At page 275 of the same decision, the P.P.A.B. cites the definition of the word "subdivision" under the old Planning Act which is found in Section 1(i):

> "'subdivision' means any area of land which has been divided
>
> (i) into two or more parcels where a municipal subdivision by-law is in effect, or
>
> (ii) into four or more parcels where only regulations under subsection (1) of Section 49 apply."

This reference is contained in the definition section of the old Planning Act in force at the time the decision on lot consolidation was made and was still in force when the appeal against such lot consolidation was commenced.

The new Planning Act defines "subdivision" in Section 3(r):

> "'subdivision' means the division of any area of land into two or more parcels, and includes a resubdivision or a consolidation of two or more parcels;"

If the old Planning Act is to be followed at the hearing of this appeal, then the cited section in the Halifax City Charter prevails and the lot consolidation appeal lies to the County Court for District Number One under the authority of Provincetown (supra) and not to the Board.

If the new Planning Act applies, it deals with lot consolidation by defining lot "consolidation" as "subdivision". Subdivisions are dealt with by the decision of the Development Officer (See Section 96(1) of the new Planning Act) and can be appealed to this Board (by the Applicant only) under Section 103 of the new Planning Act. City Council now would not deal with lot consolidation and therefore the proclamation of the new Planning Act would, in effect, make nugatory lot consolidation provisions provided for by Section 533 of the Halifax City Charter. If the new Planning Act governs the lot consolidation appeal, then this lot consolidation could only properly be before the Board on an appeal by the Applicants. They have not appealed therefore there is no appropriate way for the present Appellants to bring this lot consolidation appeal to this Board under the new Planning Act, either.

The lot consolidation decision appealed from was made by City Council under then appropriate legislation, Section 533 of the Halifax City Charter. There is no evidence before this Board that an appeal was made within time to the County Court for District Number One. The appeal of lot consolidation before the Board was not properly before the Board at the time of the filing of the two Notices of Appeal and therefore there were no "...legal proceedings...begun" within the meaning of Section 22(e) of the Interpretation Act capable of being carried on through either the repeal of the Planning Act or the continued existence of the Halifax City Charter (Section 533) following its implied repeal by the new Planning Act (vide Section 3(r) of the new Planning Act (supra). The Board has no jurisdiction to inquire whether or not there is a subsisting appeal of the lot consolidation decision of City Council before the County Court for District Number One. It is enough for the Board to say that there was never a lot consolidation appeal properly before the Board at any time in this matter while the Board had jurisdiction to hear appeals concerning lot consolidations. This finding does not in any way affect any appeal from the lot consolidation decision that may be outstanding before the County Court for District Number One.

After three and one-half days of hearing, the Board has no trouble finding certain facts:

1. The building proposed on the lands will be

four storeys on Creighton Street and some nine storeys on Gottingen Street and will cover a great deal of the surface of the land in question (see Sketch 2, page 8, Exhibit 10).

2. The lands have a rock rib down the center and will require rock excavation to allow construction.

3. The eight or nine or ten lots here were consolidated into one lot on October 20, 1982, by a decision of the Halifax City Council.

4. All witnesses before the Board that were asked agreed that significant development is appropriate for the lands.

5. The "neighbourhood" of the lands are considered by planners as being a "soft" area requiring redevelopment. The buildings that do exist on the lands are dilapidated and do not economically lend themselves to rehabilitation.

6. One witness says, without contradiction, that there is a high demand for residential rental accommodation of the nature of this proposed development in the Halifax Peninsula Area and in this area in particular.

It is common ground that the Board must determine the intent of the M.D.P. and relate it to the development agreement and, on such comparison, to determine whether the decision of Council in approving the resolution allowing the development agreement cannot reasonably be said to carry out the intent of the M.D.P.

The evidence shows that the Applicants applied to the City of Halifax for a 120-unit proposal designed with the needs of the Vimy Legion subsidized housing scheme in mind. Michael Argand was going to build this Vimy Legion scheme on the lands. This application for development agreement was turned down at once at the staff level on the grounds that there was too much of subsidized rental housing in the area already in the form of Northwood Manor, a high rise nursing home complex, Ahearn Manor, also a large residential building designed for senior citizens, and Sunrise Manor a high rise building which, as well, is directed towards the needs of senior citizens.

Michael Argand pursued approval of a development agreement for the lands, relying on the same application form used in the "Vimy" application, and submitted a plan for a 116-unit building which staff reported on to City Council. Council approved by resolution a development agreement on the lands on October 14, 1982, in these words:

> "...as recommended by the City Planning Committee, the proposed development of 116 dwelling units at the northwest corner of Gottingen and Charles Street, with changes as noted by staff, to the number of family units, number of parking spaces and the buffering around 5521 Charles Street, as noted in the August 9, 1982 report, be approved."

The staff now has before it further plans for the subject development containing only 108 units which has not officially been seen by Council since the approval process was interrupted by this appeal.

Mr. Kassner has testified that the "envelope" (meaning the outside appearance and design of the building) submitted in the development agreement application has not substantially changed from the 116 units to the 108 units proposed but, because of the direction of Council for "more family units" and "more parking", the interior design of almost every unit has been changed.

Section 33(2)(b) of the old Planning Act cited above provides for the passing of a Zoning By-law by Halifax City Council for the purpose of carrying out the intent of the City's M.D.P. Under the provisions of the M.D.P. contract zoning is provided for in Part III Programs & Procedure Section I Strategy Statements Municipal Development Plan Process Recommended Strategies 1 and 5 commencing at Page III-33.

> "Recommended Strategy
>
> It is recommended that the proposed zoning strategy as outlined below be approved as the basis for the applicable sections of Part II of this document:
>
> 1. For all areas designated for detailed planning the City develop an overlay zone under the provisions of Section 33(2)(b) of the Planning Act to enable contract zoning. This provision would require, among other things, defining those uses which would be permitted as of right and those uses and/or intensity of uses which would require permission of Council through a resolution of Council.

....

> 5. For those soft areas which lie outside areas designated for detailed planning and which are presently developed for some use, the City should develop appropriate zoning provisions for each to include, alternatively, rezoning to existing use within the present provisions of the existing bylaws of the City of Halifax, developing a conditional zoning package under the provisions of Section 33(5), and/or should develop zones to allow contract zoning under the provisions of Section 33(2)(b) of the Planning Act."

Thus the Statute (Section 33(2)(b) of the old Planning Act), gave rise to Part III Programs & Procedure Section I Strategy Statements Municipal Development Plan Process Recommended Strategies 1 and 5 (supra) of the Halifax M.D.P. which underpins the Zoning By-law, Section 83(3). This paper trail is now intact and supports the power of Council to enter into contract development agreements in this area.

Council had the power to make a decision in contract zoning at the time it did so.

Did Council, on October 14, 1982, make a decision of the type contemplated by this Board capable of being appealed to this Board?

Mr. Ross argued forcefully throughout the hearing and in his brief that the decision of City Council of October 14th was not properly made since under the City of Halifax Land-Use By-law, Section 83(3) "Council may, after public hearing and by resolution, approve any specific development requested".

Mr. Ross advanced the idea that what the Council had done was nugatory in that it had to approve by resolution, a specific development request and it had not done so. On this point he made, as the Board understands them, the following arguments:

1. That there was insufficient specificity to ensure the planned specific development, and

2. The general approach by Council had never addressed the "specific development requested" and, collaterally, the development as now requested, was never put before Council; the agreement decided upon by Council had never been requested by the Applicants so that, in effect (in either or both cases), City Council had nothing before it on which to decide and therefore it could not legally have made the decision that it did.

If Mr. Ross is correct in this position, then he may have had (and perhaps still may have) a prerogative remedy not available to him in an appeal to this Board. It is the position of Mr. Thompson that we cannot consider these "supposed illegalities". Mr. Thompson is quite correct if he is saying this Board cannot give prerogative remedies to correct illegalities. If he means to say that we cannot listen to the evidence of a course of conduct by the City and by the Applicant and others involved in the approval process in order both to perform our general function of determining existence and non-existence of a development agreement in order to compare its consistency, or lack thereof, with the intent of the M.D.P., then the Board holds the opinion that his submissions would be incorrect. The Board can and must consider the evidence of the events leading to the decision of Council and all the relevant legislation in order to determine the intent of the M.D.P. and the intent of the development agreement to ascertain if it is reasonably consistent with the M.D.P. (See Arenburg v. Town of Amherst, NSMB-493-85-P). The evidence is there for the Board to view, the Board cannot give any remedies of a prerogative nature, but at least the Board may consider these objected-to factors in gauging whether or not the City Council made a decision reasonably consistent with the intent of the M.D.P.

Before going any further it may be helpful to the Board to consider what each party thinks the Board can do in any eventuality in this appeal.

Mr. Anstey submits that all the Board can do, even if it goes to its extreme position and decides that the scheme complained of does not reasonably agree with the intent of the M.D.P., is to send the matter back to City Council. At page 35 of his brief he says "(2) Make a finding...cannot reasonably said to carry it out...[then] refer the matter back to Council for further consideration...".

Mr. Thompson does not address the possibility of the Board's failure to find his client's scheme incompatible in intent with the M.D.P.

More surprisingly Mr. Ross, at page 10 of his memorandum, argues "...the matter is sufficient to send back to council...". He hopes that we send it back to council with very unfavourable comments from the Board hostile to the scheme. The Board maintains that under the old Planning Act, Section 35(2)(a), supra, it could "...make any decision Council could have made, or". One of the decisions Council could have made would have been to reject the application. Since that is a decision that Council could have made, the Board would have thought that that option, at least, was as open to the Board as it had been to Council.

Regardless of the representations of counsel, a review of the old Planning Act and its amendments (since all are now obsolete) shows no change in the wording of Section 35(2)(a) during its legislative life in any substance. Section 71(4)(b) of the new Planning Act makes this same intent crystal clear in that there were three (not two) options available to the Board on appeal and one of those options is a reference back to Council and one of those options is to make any decision Council could have made.

In any event, the Board is of the opinion that the menu of remedies open to the Board in this appeal is as follows:

1. dismissal of the appeal, which of course would be confirmation of the action of Council;
2. allowance of the appeal and rejection of the development agreement;
3. allowance of the appeal and with some reference back to council with some new scheme of contract development.

In his memorandum, Mr. Ross feels his final argument may be less than perfect because of his apparent inability to make notes during certain stages of the appeal hearings. The Board notes that it provides to the public, which includes Mr. Ross, the following facilities for preservation and dissemination of the evidence on an appeal:

1. Recorded tapes of the evidence and listening facilities are available at the Board's office, Suite 510, 1809 Barrington Street, Halifax, free of charge;
2. Official transcripts from those tapes, in whole or in part, can be made available upon request from the Board at the usual

cost and delay of such transcripts.

3. "unofficial" copies of the tapes (at much less cost than a transcript) can be made available upon request from the Board. (The Board has a duty to record all its proceedings under Section 39 of the Municipal Board Act.)

The decision complained of was made after a public hearing. The decision followed the general theme of a development agreement on the subject lands pursuant to an application made on behalf of the Applicants. The theme was advertised and all views pro and con were canvassed. Staff reports were read, counsel were heard, argument was made, anybody present at City Council with a right to say anything was heard. If such things had not been done, the Board could not have granted any prerogative remedy. It could, however, have considered any evidence indicating unfairness in helping it to arrive at its determination as to whether the decision of Council on the development agreement meets the intent of the M.D.P. and is reasonably consistent therewith.

Mr. Ross would have us hold that the Appellants' public hearing could only consider the specific development requested of City Council at these early stages. The By-law (and the Statute it so clearly follows) is logically capable of that interpretation and thus his forceful argument on this point has some merit. In the context of either

Planning Act the legislative intent is clear: Someone must apply for approval of an agreement; the essence of the proposed agreement must be advertised and persons especially interested must be otherwise notified so that persons who may be affected thereby may appear and be heard by Council. The general intent of any recent Planning Act is to encourage public participation and also to give time for the municipal planning staff to study and to advise its elected masters, City Council, on Council's various duties and its options and to explain to Council the impact of the development agreement within the context of the M.D.P. and the planning needs of the City. The specificity called for by Mr. Ross (and, indeed, perhaps by the By-law and the Statute) does not and cannot, in any rational planning scheme of things, allow itself to be detailed precisely at the decision stage of the council proceedings. The Legislature did not intend that that specificity, as defined by Mr. Ross, would come into the development agreement approval process at such an early stage. When Council passed the resolutions appealed from (and in the absence of any authority to the contrary), the Board would have thought that the proper interpretation of " approval of any specific development requested", would have been as Mr. Ross had advocated. Mr. Ross made the arguably valid point that what City Council approved was neither specific nor requested. Heritage Trust (supra) appears to dismiss Mr. Ross' interpretation at page 363 of Cowan C.J.T.D. (again) "...that the condition referred to in Section 34(1) that...the...owner of the land enter into an agreement with the council, is a condition subsequent and not a condition precedent to approval by the council of the proposed development".

In Heritage, many of the specific developmental specifications were not dealt with prior to the decision of City Council:

1. The registered owners were not available to give signatures to the planning applications;
2. The scheme before Council violated the existing mandatory view plane legislation;
3. Notices required to be posted were not posted;
4. The development plans required additional adjustment before construction could commence.

Despite these deficiencies (lack of specificities), Cowan C.J.T.D. in Heritage approved the process followed in the previous decision of the Planning Appeal Board. He refused to quash the previous decision of the Board, and he refused to quash, as well, the previous decision of City Council although he had the power to do both. This Board is not prepared to disagree with the high authority of Heritage in its interpretation of the old Planning Act and its interpretation in this particular Zoning By-law. Cowan C.J.T.D. (to arrive at the result that he did) in Heritage, had to make findings express or implied that the meaning of a resolution on "a specific development contract approved by resolution" was adequately met if the general scheme requested, refined in staff reports, and publicly displayed in advertisements and in Council debates, eventually culminated in a resolution by Council approving the general outline of the scheme. That is the result of the reasoning in Heritage and Heritage's interpretations of the City's Zoning By-law, Section 83(3). The result of Heritage applied to this By-law makes good sense from a planning point of view even if it makes for bad semantics. The Board's present interpretation of the City's Zoning By-law, Section 83(3), by applying the reasoning of Heritage to the facts in this appeal, makes sure that Halifax planning applications are processed in accordance with a workable and sensible practice which practice falls within a remedial interpretation of the old Planning Act and the By-law (supra).

Mr. Ross again takes issue and says that the scheme was altered to such an extent after the appealed Council resolution that this surviving application should be taken back to stage one and re-advertised; it should, in effect, again go through the full planning process from the beginning. Heritage, again, seems to provide the answer for this proposition in the negative. To try to reconstruct the results of applying Heritage to this scheme "by resolution approving any specific development requested" requires this type of thinking:

1. Council must have a public hearing before the resolution;

2. The request may be a general one at application stage and the request may change in the context during the negotiation process between Council and the developer; between Council the developer and the citizens; between Council and staff; the staff and the developer, and may be refined and polished at each step as the application proceeds through the approval process.

3. There may not be an absolute linkage at all times between the adjective "specific" and the adjectival verb "requested" and they may not have to apply to the "resolution" both at the same time.

4. Before implementing a specific development scheme the development must be requested specifically and must be approved by resolution of Council.

At this stage of the reasoning, Mr. Thompson's brief makes the argument that, if Mr. Ross's argument is correct in that Council had not adopted the specific development requested, then Council still had a resolution to pass. That resolution is the consideration of the 108 unit development (at its now staff-approved level). The 108 unit development scheme has never specifically been before Council; therefore no final decision has been made by Council and, therefore, Mr. Ross's appeal is premature and ought to be dismissed on the ground that it is premature. Heritage, however, quoted the phrase "specific development requested" many times and made no express findings thereon but, as the Board stated before, Heritage made several implied findings interpreting this particular phrase. In Heritage, the Judge considered facts very similar to the facts in the instant case and the phrase "special development requested" must have been considered. Given the result in Heritage, this Board is bound to say that Mr. Ross did appeal the appropriate resolution. Council itself, Mr. Anstey, Mr. Thompson, Mr. Ross and all counsels' various clients treated the decision appealed from as being the final substantial decision of Council capable of being appealed. If the Board follows Mr. Thompson's argument to its logical conclusion, it would have to find Council had not yet approved any specific development requested since the only specific request (still existing), that for 108 units, has never been to Council and has never been approved by resolution. All previous requests have either been rejected outright or have been sent back for changes. If this conclusion drawn from Mr. Thompson's arguments were correct then this appeal would be premature since Council had not yet approved any "specific development requested". Heritage had much the same facts. The validity of the P.P.A.B. decision on the land and the validity of Council's decision had both been upheld by the judge. Thus Heritage appears to leave the Board necessarily to imply that Mr. Ross's clients appealed the appropriate decision of Council. As an additional ground for this finding, you will note that the Applicants and the City did not in the two or three years intervening between the Council's decision and this appeal hearing move (before a court of competent jurisdiction) to strike down this appeal on the grounds that it was premature. Halifax City Council refrained from proceeding to ratify the 108 unit scheme. The Appellants, the Applicants and the City all treated this appeal as an appropriate appeal of the appropriate decision. It is difficult for the Board now to give weight to the Applicants' argument that the appeal is premature because the Council by resolution has not yet approved any specific development proposal.

The above findings, in the absence of the authority of Heritage, are hard to defend semantically. They do follow, however, a fit and "remedial" reading of the old Planning Act and, so found, easily support the planning process as practiced by the City of Halifax. This interpretation allows full public discussion, full and free discussion by council, and full and free access (with certainty as to timing) to the appeal channels. This reading of the By-law and its underlying statutory authority fits the planning process just as intended, in general, by the Legislature. Again, this Board says that it feels bound by the findings in _Heritage_ in its interpretation of the intent of the relevant planning legislation and the Board adopts _Heritage's_ remedial interpretation of that legislation.

The Board heard a great deal of evidence concerning the pre-decision process leading up to the decision of City Council. Mr. Ross argues that there were various defects in the decision and pre-decision process. He alleges, for example, that the Applicants did not follow the City's application form as to its signatures. He said the City did not give him the attention he wished for in correspondence and did not respond to the wishes of the neighbourhood citizenry in that the wishes of the neighbours seemed clear and City Council did not agree with those neighbours. The Board at the hearing felt, and still feels, that this evidence was all relevant (and admissible) for evidence to be heard in considering whether the decision of Council in passing the instant resolution was consistent with the intent of the M.D.P. of the City. Evidence of procedural preference brought before the Board might indicate to the Board an attitude of staff and/or Council which could show that the resulting planning decision might not be in accord with the intent of the M.D.P. and thus the Board might be able to infer certain conclusions relating to Council's decision and whether or not it properly addressed the intent of the M.D.P.

The Board agrees with the City's counsel and counsel for the Applicants when they argue that the Board is unable to review the pre-decision process for defects with a view (assuming such defects existed) of whether Council violated any rule of natural justice or any other rules concerning fairness and the duty of Council to treat the Appellants with "fairness". The Board agrees that the issue of "fairness" and "natural justice" are sources, or heads, of striking down actions of Council and are not within the jurisdiction of the Board. Such review of "due process" falls only within the prerogative exercised by courts of superior jurisdiction. Thus the Board can only peruse all the evidence of alleged defects listed by Mr. Ross with the very limited use in mind that it has set out, above, in this particular appeal decision. The Board notes, in any event, that all the items alleged, are not of such a serious nature as to throw doubt on Council's willingness to refrain from passing a resolution contrary to the M.D.P. The deficiencies alleged are relevant, interesting, but, in this appeal, not determinant.

The crunch of this appeal is whether or not the resolution and the decision by City Council is consistent with the intent of the M.D.P. (See Section 33(2)(b) of the old Planning Act). In 1982, when the decision of Council was made on this resolution, Section 28 of the Municipal Board Act was in force and effect and read as follows:

> "In any matter before the Board, pursuant to the Planning Act, where an appeal is from a decision of a council, the Board shall not interfere

> with that decision unless in the opinion of the Board the council's decision cannot reasonably be said to carry out the intent of the municipal development plan, and where there is no plan in force the Board shall not interfere with the Council's decision unless the decision is inconsistent with or unnecessary for the protection of the best interests of the municipality."

Under that statute at that time, the Board had a negative duty not to interfere with the decisions unless in the opinion of the Board the Council's decision could not reasonably be said to carry out the intent of the M.D.P. That Section of the Municipal Board Act was repealed under Section 120(3) of the new Planning Act. The similar Section of the new Planning Act addressing appeals of this nature applies a similar test under Section 71(3) and 71(5) of the new Planning Act the texts of which are as follows:

> "71(3) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy.
>
> (5) The Board shall not interfere with the decision of the council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy."

Regardless of when the Boad heard this appeal, under whatever Planning Act, it would have had to apply, basically, the same tests. In any event for the reasons set out before, the Board, in this appeal, is going to apply Section 33(2)(b) of the old Planning Act and Section 28 of the Municipal Board Act because the newer statutes may have created a heavier burden on the Appellants than they had at the inception of this appeal. On more mature reflection it seems, however, that there is really no difference in the two sets of tests provided by the "old" and the "new" legislation for the Board's review of the Council decisions.

Mr. Thompson argued that the differences do not affect the meaning so he is not offering any choice between which tests ought to be applied. The Board agrees that there is probably no difference in result between the old test (combination of the old Planning Act plus the Municipal Board Act) and the new Planning Act alone but says that there may be a greater burden under the newer test on the Appellants and therefore the Board will apply the older test. In either case, the Board would find the results would not be, in this particular aspect of this appeal, changed.

Under the old Planning Act, the Board must determine whether or not the decision of Council appealed was inconsistent with the intent of the M.D.P. If it was not, then the appeal would fail at that point. If the decision of Council were inconsistent with the intent of the M.D.P., then the Board would then have to apply the test of whether or not it can reasonably be said to carry out the intent of the Plan.

The lands are zoned R-3. Among R-3 as-of-right uses for the site is the use as an apartment house. This project before City Council violates the as-of-right requirement under the existing zoning in parking requirements, angle requirements, number of units per lot [25] requirements and height (50' and 35') requirements. Negotiated replanning might have removed the failure to meet certain "as-of-right" requirements but the units per lot requirements and the exceeding of the height restrictions could not be cured by any negotiation process. If the City wished to develop this particular land in this particular way, it could only go by the development agreement process since there was no way otherwise to negotiate around the 25 dwelling units per lot per building requirements and 35' or 50' height restrictions. Together with the lot consolidation, the application here appealed was made to correct all these problems consistently with the M.D.P. (See Section 33(2)(b) of the old Planning Act).

At page 17 of his post-hearing memorandum, Mr. Anstey summarizes the complaints made by the Appellants in these words, "the opposition to the proposed relationship to the mess [read "mass"] of the building, its population density, parking, open space and the buffering of adjoining property...". The subject area is located within an area designated by the City for detailed area planning (which planning is underway but which has not resulted in a detailed area plan). The Board agrees with Mr. Anstey's submission that the burden is on the Appellants to demonstrate from evidence adduced before the Board that Council cannot reasonably be said to have carried out the intent of the M.D.P. in arriving at the decision appealed from. That burden can be met from any or all of the evidence brought before the Board no matter through whom. The Board, in determining whether this burden has been met by the Appellants, is not bound to look only at the evidence adduced by the Appellants but may look to all the evidence before it.

The City states that the development approved agrees with Policy 1.1:

> "Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services."

The Board agrees with the City's counsel that the exacerbation of the traffic conditions in this area which will be produced by the building under the scheme approved is insignificant in relation to the total traffic near the site. In that respect the facts relating to traffic in this appeal correspond very closely to the traffic problems dealt with by the Board in Tenwolde v. The City of Dartmouth, NSMB-464-84-P, (See page 33 of the filed decision) where Council's refusal to approve a townhouse development (immediately adjacent to the MicMac Rotary in Dartmouth) was appealed to the Board. In Tenwolde, traffic was found to be a factor to be considered by Council but, in relation to the total traffic problem in the area, it was such a minor factor that it was not a determinant of whether or not the development proposed violated the M.P.S. Traffic is a factor to be considered, but in this apeal, as in the Tenwolde appeal, it is not a determinant. Here traffic as an issue was brought before Council and Council made its decision in full knowledge of the traffic issue.

The evidence shows that the on-site parking to be provided was sufficient to ensure there will be no excessive demand put on the on-street parking facilities which are already in short supply in the area surrounding this proposed development.

The mere presence of the building intended on the subject site would cure the complained of on-site storage of derelict cars. City Council knew of the readily available adjacent open spaces in the school yards and playgrounds in the very near vicinity of the subject site. Using the open-space calculations as applied to the subject site by the architect, Mr. Kassner, in accordance with his correct interpretations of the City regulations (including in his open space calculations, sidewalks and half the adjacent streets), showed there was sufficient open space for development so that this particular complaint of the Appellants as to the development's lack of open space was not justified in the light of the regulations concerned.

Buffering gives the Board some problem in relation to adjoining properties, especially as it relates to the house of the Appellant Brown. The planning experts say that sensible buffering of the Brown lot is possible by installation of fencing and the planting of trees and other techniques of a like nature. A view of the site made by the Board causes doubt to the Board that any meaningful buffering, especially of the Brown lot, is possible. The Board, however, bows to two factors, firstly, the absence of Mrs. Brown to give specific complaints to the Board concerning the buffering issue (without any explanation for her absence on the record) and, secondly, the unanimous opinion of all the planners working for the City that buffering would be adequate especially for the Brown property and would be provided for in the final development when built. Given the evidence thus adduced, the Board must find that the development agreement contemplated reasonably adequate buffering for all the adjoining properties.

The population density, because of the configuration of the land, would be higher in the proposed building than it would be in the development of the land in an "as-of-right" basis under the R-3 Zone of the City's Zoning By-law. Argument can be made that, in ideal conditions, the population density anticipated from the building "as of right"of the proposed locality would approximate the population density envisaged under the development agreement. In ideal conditions, the square footage of the subject site would allow five lots developed "as-of-right" which five-lot figure would mean five buildings of 25 units each for a total of 125 units. The square footage available on this site cannot be developed to this ideal because of the actual configuration of the land as it exists on the ground. Thus population density would be higher in the building provided for in the contemplated scheme than under the "as of right" construction under the existing R-3 designation of the lands. That density increase is not sufficient in the opinion of the Board to violate the intent of the M.D.P.

This finding leaves the "mass" of the proposed building as the only decisive objection of the Appellants remaining to them if they are to succeed in this appeal.

The evidence shows there is a necessity for more residential buildings in the City of Halifax. Uncontradicted evidence by Mr. Campbell shows that there is a very low vacancy rate in apartments in the City of Halifax which is another good indicator of the necessity for the construction of more residential apartments. The Applicants have pressed this proposed development forward, for at least three years now, which allows the Board to infer that the development meets an economic demand in the minds of the developers and these subjective intentions are indicators that there is an objective demand for proposals of this type to be built in the City.

Halifax's M.D.P. Part II Municipal Development Plan Section II City Wide Objectives and Policies Policy 1.1.1 (at page II-3) states:

> "On the Peninsula, residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighbourhoods; and the City shall develop the means to do this through the detailed area planning process."

This policy provides that residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighbourhoods with the means to do so developed by the City through the detailed area planning process. One might argue that this reference refers to all residential development in the peninsula and that, in the absence of the completion of the detailed area planning process, no residential development is possible. The Board rejects this particular argument.

There is no indication on the evidence that City Council and/or City Staff had any regard to the mandatory policy 1.3 of Section II of Part II of Halifax's M.D.P. which states:

> "The City shall investigate alternative means for encouraging well-planned, integrated development."

"As-of-right" development had been made just north of the site within the boundaries of North, Creighton, Gottingen and Charles Streets. Council had a positive duty under that Policy 1.3 to investigate this type of development as an alternate means of attempting to encourage well planned integrated development.

See Implementation Policy 3.2.1 [Section V] Implementation Policies of Part II, of Halifax's M.D.P.:

> "Further to Policy 3.2 above, the area identified in Section II, Policy 1.5.2 and numbered 1, 2, 3, 4, 6, 7 and 9 shall be identified on the zoning map and within such areas no development permit for multiple-unit residential development of over 50 feet in height or 25 units, or for a commercial or institutional development of

> over 35 feet in height or 5,000 square feet in floor area shall be issued, except under an agreement with Council pursuant to Section 34(1) of the Planning Act."

which allows the limits of 25 units per lot and the 50 foot maximum height to be exceeded by a development agreement with the City. This policy is provided for by the Statute and provided for by the By-law dealing with development agreements. The question now finally arises: Are these height arrangements, which Council proposed to make here, compatible with the Policy 1.1.1 in the context of this particular neighbourhood and this particular development appealed against? If the Board accepts the City Planners' interpretations of the M.D.P. and the development agreement uncritically, the Board must say "yes". If, however, the Board looks at the evidence of the City Planners more critically it might question the decision of Council. Staff turned down the Vimy scheme out of hand. The 120 unit development submitted to Council was approved as a 116 unit development. At the request of Staff the developer Applicant has retreated to a 108 unit development. These various reductions in living units were made by shifting the internal mix of apartments basically by increasing the number of family units and reducing the number of bachelor units. Yet the size of the envelope of the building and coverage of the lot has not really been reduced (see admission in evidence of Mr. Kassner). The high rise aspect of this building has been constant throughout. Staff recommended to the Applicants against the Vimy project because there were too many "high rises" in the area and they named them: Northwood Manor, Ahearn Manor, and Sunrise Manor. At a later date they said the subject high rise development should be accepted in the neighbourhood because of the precedents already there, namely: (can you believe) Northwood Manor, Ahearn Manor and Sunrise Manor. One or both of these views of staff must be wrong.

In essence, this proposed high rise development on the land is not compatible with the neighbourhood. It is too massive in scale. A recent appeal before this Board (relating to the City's approval of a development agreement in peninsular Halifax), Kaiser et al v. City of Halifax, NSMB-483-85-P, at page 54 of the filed decision, the Board refers to Policy 1.1.1. (supra) and says that "The Board is of the opinion that the proposed development is not compatible with the existing neighbourhood in that...it is too high in comparison...to the...residential properties...". On the facts, there is little to distinguish between the development on Charles Street and the one on South Bland Street. The subject property development is, in the opinion of the Board, too massive for the area and too high in comparison both with the existing old residences in the area and with the modern multi-family residences in the area recently constructed and which can be found within the confines of the area surrounded by Charles, North, Gottingen and Creighton Streets. The Board makes this finding after giving all due weight to the evidence of need for the construction of more residential apartment units in the City.

The Board having carefully reviewed the evidence adduced at the hearing, having viewed the subject site and surrounding area, having perused the briefs filed by the parties and having examined the City's Municipal Development Plan and Land-Use By-law, has determined that, for the reasons stated in the decision, it shall interfere with the decision of City Council on the basis that the decision of Council approving the contract development cannot reasonably be said to be consistent with the City's M.D.P. As outlined above, the Board is authorized to make any decision that Council could have made. Council could have (and should have) rejected this development contract ab initio. The Board therefore allows this appeal and rejects the contract development to permit" the proposed development of 116 dwelling units at the northwest corner of Gottingen and Charles Streets with changes noted by staff as to the number of family units, number of parking spaces and the buffering around 5521 Charles Street" approved by the decision of the City Council made on October 14th, 1982.

The lot-consolidation appeal is dismissed for lack of jurisdiction of the Board to hear it for the reasons above set out.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 25th day of February, A.D., 1986.

RICHARD L. WELDON, Member.

Lee's Auto Salvage Limited v. County of Cape Breton

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-3 AND A-2 TO M-2 TO PERMIT SALVAGE YARD--WHETHER INCONSISTENT WITH OR UNNECESSARY FOR PROTECTION OF BEST INTERESTS OF MUNICIPALITY--MUNICIPAL BOARD ACT, SS. 16(1), 63(4)(c),(6),(7), 66(6),(7)--SALVAGE YARD LICENSING ACT

This is an appeal from the refusal of the County of Cape Breton to rezone certain lands from R-3 and A-2 to M-2 to permit use as a salvage yard. M-2 is a zone for heavy industrial use. A salvage yard was already in operation on the site. There is no Municipal Planning Strategy for the district in question.

HELD: The appeal is allowed.

Under s.63(6) of the Planning Act, the Board has to determine whether the decision of Council refusing to amend the land-use by-law is inconsistent with or unnecessary for the protection of the best interests of the municipality. If Council's decision is either inconsistent or unnecessary or both, then the Board can interfere with that decision. The Municipality's planner-witness did not direct himself to what constituted the best interests of the municipality, nor to the necessity of the decision to protect those self-same, albeit undefined, best interests. No where in the proceedings before the Metropolitan Planning Commission, the Planning Advisory Committee or the Municipal Council is there an expression of opinion explicitly defining the best interests of the Municipality or the necessity or consistency of the decision as it relates to those best interests. The Municipal Councillor giving evidence did express a firm opinion that the rezoning was in the best interests of the Municipality. The Board believes the almost visceral dislike of the planner advising the Municipality concerning salvage yards probably coloured his judgement. His general recommendation against the instant rezoning was not deserving of the support that would ordinarily accrue to his recommendation because of his training, position and experience. Despite operating a salvage yard without conforming to the planning laws, the applicant has made a genuine effort to conform to the demands of authority. It should not here be inferred from the fact that the Municipality voted to refuse the rezoning that the decision is in the best interests of the Municipality. This is because the Council made apparently conflicting decisions at the same meeting, probably did not consider the best interests of the Municipality but decided the issue most probably in some confusion, and may have acted on inaccurate advice. The vacuum left by the evidence of the Municipality as to best interests is well filled by the economic desirability of the proposal and the informed and tightly reasoned opinion of the Councillor. The best interests of the municipality require that the economic benefits of the proposal be made available to the community.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983 Chapter 9;

- and -

IN THE MATTER OF: An Appeal by LEE'S AUTO SALVAGE LIMITED, a body corporate, Appellant, from the decision of the Council of the Municipality of the County of Cape Breton, Respondent, made on November 7th, 1985 refusing to amend the Respondent's Land-use By-law by changing, from R-3 and A-2 to M-2, the land-use designation of certain lands at or near Number Four Hill, Little Pond, in the Municipality of the County of Cape Breton, Province of Nova Scotia.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: H.F. MacINTYRE, LL.B., for the Applicant Appellant;

DAVID N. MUISE, LL.B., for the Respondent Municipality.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S., 1981, The Municipal Board Act, The Chairman assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's March 11, 1986 sittings at the Council Chambers (hereinafter called the Chambers) of the Council of the Municipality of the County of Cape Breton (hereinafter called the Council), Grand Lake Road, Sydney, N.S. This appeal is made by the Appellant on notice, erroneously directed to the Secretary of the Provincial Planning Appeal Board, the Cape Breton Metro Planning Commission and the County Clerk County Offices Grand Lake Road, Sydney, N.S. The Notice, dated November 27, 1985, was received by the Board on November 28, 1985 and states that the Applicant appeals the November 7th, 1985 decision of the Council refusing the Appellant's application to amend the Municipality's Land-use By-law by changing the designation of certain lands of, or controlled by the Applicant from R-3 and A-2 to M-2.

The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman took objection to the Notice and, in a letter dated November 28, 1985, directed to one Nash T. Brogan, then solicitor for the Appellant, requested the filing of a more appropriate amended Notice of Appeal within two weeks of November 28, 1985. In accordance with the Chairman's instructions, an Amended Notice of Appeal, dated December 11, 1985, was filed with the Board December 12, 1985.

In this subject area of the Municipality of the County of Cape Breton (hereinafter called the County), R-3 is a land use designation which permits mobile homes, community rest homes and all R-1 and R-2 uses - residential uses all. A-2 designation allows certain agricultural uses. Neither existing designation would allow use as a salvage yard which use the Appellant seeks. The proposed rezoning (M-2), a heavy industrial use, would permit the subject land's use as a salvage yard.

The lands in question, graphically set out in Exhibit L-8 (and herein also referred to as the yard), apparently owned by the father of the principal officer of the Appellant, are situate in the district known as Number Four Hill, Little Pond, County, some distance from the margin of the Little Pond Highway near its intersection with a disused "old railroad R.O.W." and also near its intersection with the Toronto Road. The lands are a part of a larger block of land also apparently owned by the father of the President of the Appellant. On the evidence, and on a conducted view of the site, it became very apparent that a salvage yard was already in operation on the site, with access to the Little Pond Road by way of a winding roadway leading through sapling-size second growth hardwood stands including alder and other scrap wood.

At the commencement of the sittings at the Chambers at 10:00 A.M. on March 11, 1986, all parties present agreed all preliminary services, filings, and advertisements had been accomplished in their appropriate forms and times. On affidavit proof of such service, the Board assumed jurisdiction to hear the appeal.

Mr. MacIntyre made opening remarks to the Board in which he stated (inter alia) he would be, in this appeal, relying upon Section 66(6) of the Planning Act, S.N.S., 1983, c.9 and also ss. 7 of the same Section. Mr. Muise contra. He noted there was no Municipal Planning Strategy (MPS) for the district involved in this appeal. Mr. Muise tendered a Ministerial Order (Exhibit L-10) extending the effect of the zoning by-law as provided for in an amendment to the

Planning Act being S.N.S., 1985, c.41.

First witness for the Appellant was John James Sampson, 887 King's Road, Sydney, a salvage yard inspector for the Board of Commissioners of Public Utilities (hereinafter called the PUB). He said, among his duties as such inspector, he enforced compliance with the Salvage Yard Licensing Act (R.S.N.S. 1967 c.276). He acknowledged an awareness of the salvage yard operation and the lands on which it stands (hereinafter called the yard) which are the subject of the present appeal. The yard is on the Little Pond Road in the Florence area of the County. Mr. Sampson said the area in which the yard was located was wooded and the yard's operational portion is surrounded by trees and out of view of users of the highway. He said his job included inspecting the areas of proposed salvage yards in order to form an opinion as to the suitability of those areas for licensing as salvage yards and of then making a recommendation to the PUB based on the opinion thus formed.

In the course of his duties, Mr. Sampson inspected the yard and he formed the opinion that the area "is an ideal location for a salvage yard." Together with his supervisor, he drove in and out of the yard and he found the yard easy to get in and out of. As a result of mutual consultation following this visit to the yard, Mr. Sampson and his supervisor agreed that there would be no problem and that they would easily recommend the granting of a salvage yard license to the Appellant. He felt the yard is, by comparison, one of the top salvage yards around. The entrance of the salvage yard lies some 500' - 700' "beyond" the intersection of the Toronto Road with the Little Pond Road and that intersection lies "beyond" the curve in the Little Pond Road complained of as creating a traffic hazard (when combined with the yard entrance) by some of the opponents to the proposed "rezoning". This witness therefore felt that the location of the entrance of the yard created no hazard to traffic using the yard or to other traffic using the Little Pond Road. Mr. Sampson said the yard was not visible to the users of the Little Pond Road from that road nor to the inhabitants living in the area from their homes because of the thick tree cover in the area. He felt the trees made a very good buffer separating the new proposed zone from the existing uses in the area. If the tree buffer were destroyed by fire, the salvage yard licensee would be required to replace the missing natural buffer with an artificial buffer such as a fence. The witness was led through the various requirements under the Salvage Yards Licensing Act and he stated that all requirements of that statute had been met by the present yard except, of course, the requirement that the land be properly "zoned" for salvage yard use. Garbage problems, generated during the use of the yard and which caused complaints from Metro Planning and the yard's neighbours, had been rectified by the Appellant as soon as the inspector had drawn the problem to the attention of the Appellant. Mr. Sampson recommended to the PUB that, subject to proper compliance with the Planning Act, a salvage yard license be granted to the Appellant to operate the yard as a salvage yard.

According to this witness, there are about 35 wrecks in the yard now. These wrecks use cleared area forming part of a lot approximately 700' by 850'. This witness had heard Mr. Gillis' (from Metro Planning) objections to the salvage yard license: he heard no objections from inhabitants of the area, and the municipal councillor from the area (hereinafter called the councillor) made no objections concerning the license. The PUB has held a hearing on the Appellant's application for a salvage yard license and it granted the license on June 11, 1985 - subject to planning approval.

Lee James Brogan, an officer of the Appellant, said that he first had cars to wreck (salve?) in the yard of his house and the previous witness, Mr. Sampson, had ordered him to remove the wrecks from the site and to apply for a salvage yard license. He discussed with Mr. Sampson a suitable proposed site for a salvage yard and, as a result of those discussions he selected, designed and cleared the present site of the yard. This witness said he did not understand that he would require rezoning to a M-2 zone when he selected, designed, constructed the yard and moved his salvage business to occupy the yard. The yard is located within a 40 acre lot at or near a place also called Greenhill owned by Thomas Brogan, father of the witness. He now says he understands the legal requirements to obtain and to keep a salvage yard license including the requirement to obtain a M-2 designation for the lands on which the yard stands.

The garbage removed from the yard site at the request of Mr. Sampson was garbage already on the site when this witness moved his salvage operation onto the site.

There is another salvage yard about two miles "down the road", Young's Salvage. The move requested has already cost the Appellant a "couple of thousand dollars". The witness said the Appellant also plans to operate a body shop in Florence which would be an operation related to the successful operation of this yard. He felt he would be towing cars onto the yard site about twice a day with about 10 to 12 people per day coming upon the site to buy cars.

The Little Pond Road is also already used by people using the facilities of Young's Salvage yard and that usage creates no traffic problems. When Mr. Brogan left the Council meeting of November 7th, he thought the Appellant's yard had been rezoned as requested. He recalls that two motions were put to the vote that night by Council. He didn't understand the Appellant's application had failed to be approved until he read a press report of the proceedings of Council published after the event.

Mr. Brogan reviewed the petition against the rezoning, the petition for the rezoning solicited by himself, in the light of the neighbours' residences graphically set out on the L.I.R.S. diagram of the area (Exhibit L-8). All the close neighbours, as shown on Exhibit L-8, with the exception of David Leblanc, signed the Appellant's petition. In conversing with David Leblanc, Mr. Brogan said David Leblanc had stated to him that he, Leblanc, had no opposition to the Appellant's application to rezone. His father, the owner of the lands in question, had sent a letter to Metro Planning that he supported the rezoning request.

On the opposing petition, not all the signatories were residents of the area. Some infants had purportedly signed the petition against rezoning. 10 names on the petition against lived in Sydney Mines. Bill Young, a competitor to the Appellant, had signed the petition against. Mr. Brogan felt the majority of the residents in the area did not sign the petition against the rezoning.

Mr. Brogan says the Appellant intends to employ about 10 people in the Appellant's operation when all is completed to the Appellant's satisfaction. The Appellant has plans to construct a 30' to 60' building on the site. The income generated by the business of the completed salvage yard, will be ploughed back into other business in the Florence area such as an upholstery works and a replating shop which would employ 25 to 30 people. The witness spoke to all the residents in the immediate area of the yard and none expressed any opposition to the rezoning scheme once they had heard Mr. Brogan's explanation of what the Appellant was trying to do.

According to Mr. Brogan, traffic, on or off-road has been no problem in the Appellant's operation of the yard to date.

Mr. Brogan estimated the site to be rezoned contains about 10 acres with about 3 acres already cleared. There are, he says, about 100 cars presently resting in the yard. The cleared portion of the yard is above the level of the Little Pond Road.

After applying for the salvage yard license, the Appellant's yard had been visited by an official from Metro Planning. Mr. Brogan said the Appellant would be offering the parts salved at this site at another location held by the Appellant located on the side of the Trans-Canada Highway. He said that the Appellant had not been prosecuted for violation of the zoning by-laws.

Mr. MacIntyre's next witness was John Roderick Coady, teacher, councillor, and Chairman of the Planning Advisory Committee (hereinafter called the PAC) of the Council. He had reviewed the petitions related to the Appellant's application for rezoning. He noted that, in the opposing petition, most signatories were residents of the area affected by this rezoning application, but some were not. He pointed out that 9 names, those of the Laffin family, were all signed in the same handwriting and the family had moved out of Little Pond prior to the time the petition had been circulated. The "Walker" and the "Mitchell" signatures on the petition, to this witness, seemed to be in the same handwriting. Some of the persons named as signing the petition were infants as young as six months old at the time they purportedly signed the petition. All the "Young" signatures on the petition were the signatures of the main competitor to the Appellant and of his wife and children. In the course of his duties of councillor, the witness interviewed some of the other signatories of this petition and as a result of such inquiries he holds the opinion that other of the signatures on the petition are also "questionable". Councillor Coady formed the opinion - on which he acted - that there were "28 questionable names" on the petition against the rezoning. The councillor also stated that he received phone calls from persons who said they had signed the first petition (against the rezoning) but had subsequently signed the second petition (for the rezoning) when they finally fully understood the ramifications of the issues involved in the rezoning application.

Members of the PAC had, in the line of duty, visited the yard site. There were three applications for rezonings for salvage yards before the PAC at the same time, this one at Little Pond, one at Point Aconi, and another (which by the time of the on-site visits had been dropped) at George's River. By the time of the PAC visit to the yard, any garbage there had either been removed or been ploughed under.

Councillor Coady felt the presence of the yard in its operational mode would not unduly expand Highway traffic in the area. He feels the yard is very well shielded from the view of the public using the highways. He believes that the entrance to the yard is adequate for its purposes.

Councillor Coady informally sampled public opinion of the voters in the area in his search to help determine his own opinion of what would be best for the area and best for the municipality. He concluded that the vast majority of the voters in the area were in favour of the rezoning and he also concluded that the proposal was in the best interests of the municipality.

Councillor Coady said the events which occurred at the meeting of Council on November 7, 1985 relating to the decision appealed were "rather confusing" both to himself and "to the other councillors" who were present that night. The PAC recommendation against the rezoning was read before Council as usual (although by the deputy-chairman as the chairman had laryngitis), the Warden, as usual, asked who wished to speak for or against the proposal. Miss Fillier from Little Pond presented to Council the petition of the residents against the proposal and she expressed her views against the proposal. Richard Brogan presented a "counter-petition" in favour of the proposal and spoke in favour of the Appellant's position thereon.

A motion was then put to accept the recommendation of PAC and staff (which was against the rezoning) and the motion, after some discussion, was defeated. At this point the councillor's personal view was that the Rezoning applied for by the Appellant had passed. The county solicitor advised the Council that, if Council wished to accomplish the rezoning it had to pass a positive motion approving it. Another motion, one to rezone the yard to M-2, was put before the Council. This motion was also defeated.

At this point the councillor said he was confused and he believes, from what other councillors told him, that many of them also voted in a state of confusion. He is not sure that all who voted on the second motion voted in a like state of confusion. Miss Fillier stated publicly at a meeting that she had no objection to the other salvage yard at the other end of Little Pond. She resides closer to the second site than to the site of the yard. She can see neither from her home. The witness said the majority of the "legitimate" signatories of the petition against the rezoning lived at the other end of Little Pond.

The councillor has served on Council continuously since 1981.

PAC consists of 7 councillors and 2 citizens-at-large. The staff of Metro Planning report to the PAC. Metro Planning looks after the planning needs of the Municipality, the city of Sydney, the towns of Glace Bay, North Sydney, and Sydney Mines. The development officers for those areas are also provided by Metro Planning.

The councillor cannot recall the vote count on the motion to reject the proposal at the PAC (as Chairman he did not vote) but he remembers the vote at Council as being close and requiring a show and count of hands. At full Council there are 20 votes, including the warden, and the warden does not vote unless there is a tie vote.

Mr. Brogan did not attend the PAC meeting so the PAC heard only the opposition to the rezoning. It heard none of the positive arguments in support of the rezoning.

Council allowed a full opportunity to anyone wishing to speak on the rezoning issue before it.

On behalf of the Respondent Municipality, Mr. Muise called one witness, Mr. Malcolm Gillis of 64 Ankerville Street, Sydney, who is a planner with Metro Planning. He has worked six years in that capacity. He has a planning technician diploma from the Nova Scotia Land Survey Institute, an Economic Geography degree from Memorial University, and has testified before the Board on at least six previous occasions and on those occasions he has been accepted as qualified to give expert opinion evidence as a planner. The Board then accepted Mr. Gillis as qualified to give expert opinion evidence concerning planning matters in the geographic area serviced by Metro Planning.

He had visited the yard site early in September 1985 and there he found that the proposed site gently sloped upward from the level of the Little Pond Road screened by a buffer of trees. There were no hills separating the proposed site from the developed area or from the public highway. There were already 100 vehicles existing on the site and a lot of garbage throughout the area. The witness said the land uses in the general area were primarily low density residential and the development pattern is rather "scattered". There are large pockets of vacant land and clusters of residential developments within them as typically shown on Exhibit L-8. The nearest commercial area to the yard would be about a mile further on in Little Pond.

A Charles Power application for rezoning his land (also on the "north side" of the county and located on the Point Aconi Road about two miles from the yard site) to salvage yard use was one of the other rezoning applications before the Council.

Three applications for salvage yard rezoning had been received by the planners at approximately the same time and had been prepared to be presented to the same meeting of the PAC. Mr. Gillis decided not to write three separate reports but to write one general report for all three applications. In the opinion of Mr. Gillis, the factors involved in assessing all three applications were generally similar. All three areas had residential development, the applications were to the Industrial M-2 zone (the heaviest Industrial Zone in the Municipality), there was no guarantee in zoning that the tree buffer that existed in each case would be maintained. In two of the applications (which two included the subject application) there was an obvious disregard, intentional or not, for the planning regulations of the Municipality. In respect to the other two applications, there was a loudly expressed public concern that the rezoning, when granted, would be used for purposes other than those stated by the respective applicants and there was no way in the existing zoning by-law to restrict such other uses once the rezoning had been granted. There is no MPS and therefore no development agreement controls possible as development agreements need to be authorized by policies in an MPS. In summary, the witness said he recommended the Appellant's application be rejected because:

1. the wide variety of industrial uses available under the proposed rezoning in an area when the existing development is primarily residential.
2. zoning could not guarantee that the buffer of trees would remain.
3. the apparent disregard for the regulations of the municipality.
4. the only other application where he had recommended rezoning for salvage yard uses was in relation to an existing salvage yard and the allowance of the application for extension could only improve on an existing bad situation.

5. the usual unsightliness inherent in the salvage yard business.

There is little residential subdivision development presently being carried on in the vicinity of the yard.

The population is sparse as is customary in the rural areas in a five mile radius of the towns of industrial Cape Breton. This witness agreed that salvage yards are a necessary part of our modern social and community life given the ubiquity of the automobile and its rapid construction and quick deterioration into junk. People's perception of salvage yard operators is generally unfavourable.

When the authorities wrote the Appellant to remove wrecks from its initial site it immediately did so by placing the wrecks in their present more secluded location. When approached, the Appellant immediately cleaned the garbage from the yard site.

The witness conceded that, relative to other salvage yards, the yard is neat.

The Municipality is the only municipality in Cape Breton where the population is increasing. The "north side" of the Municipality consists of many thousands of acres from George's River-Ball's Creek area to and including Point Aconi and all the way to Boulardarie Island. The development pattern has been randomly distributed. Over the last 10-20 years the vast majority of development has occurred within a radius of 5-10 miles of the towns of North Sydney and

Sydney Mines and that area encompasses the site of the yard.

The present salvage yard on the four mile long Little Pond Road causes no problem which has come to the attention of this witness. Had the Appellant not acted in apparent disregard of municipal regulations, Mr. Gillis would have been more in favour of its application to rezone. In essence, Mr. Gillis linked all three applications to rezone together and said "no".

Rebuttal evidence was heard from Mr. Coady. He said the Northside Auto Salvage Yard (the one salvage yard rezoned with the approval of Mr. Gillis) was in a much more densely populated area than the area of the yard. The salvage yard in that case is highly visible from the road. He admitted that the visible portion of the Northside Auto Salvage site was a non-conforming use and that the portion of the site making up the proposed expansion approved of by Mr. Gillis was in a concealed location behind a hill.

Counsel have clearly brought out the facts in this appeal and there seems to be no real dispute on the facts.

Under section 63(6) of the Planning Act, the Board has to determine whether the decision of Council to refuse the Appellant's application to amend the land-use by-law in the manner requested is inconsistent with or unnecessary for the protection of the best interests of the municipality.

The Municipality's planner-witness did not in his testimony direct himself, nor was he encouraged to express his opinion, on what constituted the best interests of the municipality. He expressed no opinion whether or not the decision was necessary to protect those best interests (whatever they are). By the same token, he expressed no opinion concerning the necessity (or lack thereof) of the decision to protect those self-same, albeit undefined, best interests. The Board, is therefore left to define those best interests on whatever evidence is before it, without any direct expression on that subject by the only witness for the Municipality. Once having done that, the Board can then proceed to find whether or not the refusal decision by Council:

1. is inconsistent with those best interests of the Municipality;
2. is unnecessary for the protection of those best interests;
3. is both of, or either of, 1. and 2.

The Board holds the opinion that if the decision to refuse is inconsistent with the best interests of the Municipality then it can interfere with that decision. If the decision was unnecessary for the protection of those best interests, then the Board can also interfere with the refusal decision even if it is consistent with the best interests of the Municipality. The Board can also interfere with the refusal decision if the decision is both unnecessary for and inconsistent with the best interests of the Municipality.

A thorough perusal of the documentary record of the proceedings before Metro Planning, the PAC, and Council tendered to the Board by the Municipality as Exhibit L-7 shows no express opinion of any of the prior investigators or decision makers explicitly defining the best interests of the Municipality or attempting to define the necessity or consistency of the decision as it relates to those best interests. The Councillor, on the other hand, impressed the Board with his apparent understanding and experience in planning matters (gained in a five year municipal political career) and he expressed a firm opinion that the rezoning sought was in the best interests of the area and in the best interests of the Municipality.

He came to this conclusion having made a visit to the yard in the course of his duty as Chairman of the PAC. As local Councillor, he satisfied himself that local public opinion favoured the proposal. He expressly noted that the yard operation, illegal as it might be, was a well run operation in the context of salvage yards. He had interviewed certain of the petitioners and had satisfied himself of the relative merits of the two petitions. He had been attentive to the proceedings at Council leading to the decision appealed from and, despite his experience, was somewhat confused thereby. He noted the confusion of many of the other Councillors concerning the same decisions. He understood society's necessity to have facilities for the disposal and salvage of worn out motor vehicles. From his experience as long term PAC chairman, he also understood the damages to the Municipality's best interests if uncontrolled unsuitable development were permitted.

The Councillor's views, in some respects, were supported by the testimony of Mr. Gillis, the planner. Mr. Gillis agreed that, as salvage yards go, the yard was well run. Mr. Gillis agreed that the yard was well shielded by trees from public view. Mr. Gillis agreed that salvage yards "given the production of Detroit" were a very necessary adjunct to our society.

It appeared to the Board that Mr. Gillis doesn't like salvage yards, and his answers and his tone of voice and general demeanour, especially in cross-examination, clearly expressed this dislike. The Board believes this almost visceral dislike on Mr. Gillis' part concerning salvage yards probably coloured his judgment to the extent that his general recommendation against the instant rezoning was not deserving of the support that would ordinarily accrue to his recommendation because of his training, position, and experience.

He discounted Lee Brogan as a scofflaw. The Board has in the appeal Robert Fournier and the Municipality of the County of Halifax N.S.N.B. 474-85-P dealt with the planning scofflaw issue before. Mr. Brogan broke the planning

laws, in operating a salvage yard without having first obtained the required M-2 zoning. His evidence indicated that he was not initially aware of this necessity. Whenever confronted with official pressure to conform to the planning laws, Mr. Brogan has made a genuine effort to conform to the demands of authority. One notes that the Municipality has chosen not to prosecute the Appellant for these apparent planning violations. Within the meaning of scofflaw as noted in Fournier, Mr. Lee Brogan has not been shown to this Board to have been a planning scofflaw. To the extend Mr. Gillis based his recommendation against this particular rezoning on his belief that Mr. Brogan was a planning scofflaw, the Board holds the opinion that his belief was an inaccurate belief on which to form an opinion. Mr. Gillis gathered three applications, closely linked in the time of the making of their applications, and tried to deal with them in his recommendations all in one bunch. The other two applications for salvage yards are not before this Board but it is fair to assume that, like this application, each had good and bad features from a planning point of view. In treating the three applications (which each must stand or fall on its own merits) together, Mr. Gillis created a real risk that the bad points of one proposal might colour the treatment received by another proposal.
In the view of the Board this risk could easily have been avoided by treating each appliction separately. Each applicant was entitled to separate attention to his own application.

The Board might easily draw the inference in any appeal like this one that the decision of Council, itself, is a strong indication of what is in the best interests of the Municipality even, as appears to be the case here, when there was no such express finding by Council. The Board will not draw such an inference here from this refusal because:

1. The apparently conflicting decisions of Council made at the same meeting, although leaving no doubt, in law, of what the Council willed, clearly do not demonstrate to an acceptable degree of probability that the Board should infer from the mere fact of the existence of the decision itself that the refusal decision was in the best interests of the Municipality.
2. The decisions of Council, as accurately explained by the Councillor, lead the Board to infer that Council on voting on the subject refusal probably did not consider the best interests of the Municipality but decided the issue most probably in some confusion as to their duties. It is not for this Board to inquire into why Council did or did not vote a particular way. It is germane for the Board to say, in the face of such patent confusion, that the Board would tend to give the decision of Council less weight in assessing whether or not to draw a positive inference

that the refusal decision was in the best interests of the Municipality from the fact of the refusal alone.

3. Council may have acted on the inaccurate advice it was, as stated above, given. If it acted on that advice, it obviously acted other than in the best interests of the Municipality and thus its action could not be definitive of the best interests of of the Municipality.

4. The vacuum left by the evidence of the Municipality as to what is in the best interests of the Municipality, is well filled by the essentially uncontradicted evidence of the economic desirability of the proposal coming from its proponent and the informed opinion of the Councillor as to the suitability of the proposal in respect of the best interests of the Municipality.

The Board has before it the evidence of the economic impact of the proposal on the depressed community in which it will be situate. The Board finds that the nearest inhabitants to the site of this proposal, when fully informed of both sides of the issue, support the proposal. The Councillor most directly involved supports the proposal in a tightly reasoned manner. The Municipality has made no convincing case against the proposal. The Board therefore finds that the best interests of the Municipality require that the economic benefits of the proposal be made available to the community and the refusal decision was contrary to those best interests and must therefore be interfered with.

Additionally, the total impact of the proposal on the Municipality is sufficiently minor that the refusal decision is unnecessary for the protection of the best interests of the Municipality in any event.

The Board agrees with the submissions of Counsel for the Municipality when he argues that no case of undue hardship or extraordinary or compelling circumstances has been made out under section 63(7) of the Planning Act.

Pursuant to section 63(6) of the Planning Act the Board allows the appeal. Pursuant to section 63(4)(c) the Board, in allowing the appeal, instructs the Council to amend its land-use by-law by rezoning the yard from its present zonings (R-3 and A-2) to Industrial (M-2) Zone in order to accommodate the Appellant's proposal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of June, A.D., 1986.

RICHARD L. WELDON
Member

Arenburg v. Town of Amherst

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT MOBILE HOME PARK--AGGRIEVED PERSON--EVIDENCE AS TO EFFECT OF PROPOSED DEVELOPMENT ON VALUATION OF PROPERTY--WHETHER PROPOSAL CONSISTENT WITH INTENT OF MPS--MUNICIPAL BOARD ACT, SS. 16(1), 29--PLANNING ACT, SS. 71(1),(3),(4),(5)--TOWN OF AMHERST M.P.S., POLICIES 1.1, 1.4.1

This is an appeal by R.A. from a decision of the Council of the Town of Amherst approving a development agreement with F.H.A.R.L. to permit the construction and use of a mobile home park on approx. 18 acres of land in the Town. The land is adjacent to the Town-County boundary and is zoned R-1. The Appellant owns a home adjacent to a large field (mostly unoccupied) of which the proposed trailer park forms a part. Objection was taken to the Board's jurisdiction on the ground that the sole Appellant was not an aggrieved person. On virtually identical facts on a previous appeal by the same Appellant (decided Dec. 31, 1985), the Appellant was found to be an aggrieved person. There is not difference in the circumstances of the present appeal except that the Town has now adopted a Municipal Planning Strategy (M.P.S.). The Town maintained the Appellant was not aggrieved because she had suffered no pecuniary loss in value to her house.

HELD: The Board has jurisdiction to hear the appeal. On the merits, the appeal is dismissed.

Each person is an expert entitled to give admissable opinion evidence concerning the value of his own home and that valuation must be weighed together with all other evidence concerning valuation. Other local homeowners can give similar evidence to corroborate the Appellant's. A professional appraiser gave evidence that the value of the Appellant's property would not be diminished in any way by the trailer park, but could give no valuation to the property. An appraiser fails to quantify value before, after and during the construction of a proposed development at the peril of having his opinion preferred less than other conflicting opinions. Here the Board prefers the opinions as to value of the homeowners. On the merits of the appeal the Board notes that the population of the Town is shrinking and that there is no likelihood that the land in question will be developed for R-1 use in the reasonably foreseeable future. The Board's duty on appeal is to examine the proposed development to determine whether or not the proposed agreement is consistent with the intent of the M.P.S. Amherst's M.P.S. was adopted as a tool to help alleviate the Town's chronic lack of economic progress and clearly intends to encourage development. The proposed development is in full agreement with the letter and intent of the M.P.S.

NSMB-508-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **RUTH ARENBURG** of Amherst, Appellant, from the decision of the Council of the Town of Amherst, Respondent, made on February 17th, 1986, approving the Respondent's entering into a development agreement with FUNDY HOUSING AND RECREATION LIMITED, a body corporate, Applicant, to permit the construction and use of a mobile home park on certain lands at or near Cornwall Street and Victoria Street West in the Town of Amherst.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: RUTH E. ARENBURG, the Appellant on her own behalf;

BRIAN CREIGHTON, LL.B., and PAUL MUIRHEAD, student para-legal, for the Town of Amherst, Respondent;

KEITH BLENKHORN, on behalf of the Applicant, Fundy Housing and Recreation Limited.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board member Richard L. Weldon to hear this planning appeal at the Board's June 3, 1986, sittings at the Council Chambers (hereinafter called the Chambers) of the Town Council of the Town of Amherst (hereinafter called the Council), Ratchford Street, Amherst, Nova Scotia. [The Town of Amherst will hereinafter be referred to as the Town] This Appeal is made by the Appellant, on notice filed with the Board February 24, 1986, and dated February 20, 1986. The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman took objection to the Notice of Appeal and, in a letter dated February 28, 1986, directed to the Appellant, requested the filing of a more appropriate Amended Notice of Appeal no later than March 14, 1986. In accordance with the Chairman's instructions, an Amended Notice of Appeal, dated February 4, 1986, (some 13 days prior to the date of the decision complained of) was filed with the Board March 6, 1986 [Evidence given at the hearing by the Appellant proved that the Amended Notice of Appeal was, in fact, signed on or after February 24th, 1986].

By a separate document the Appellant undertook to pay the costs of advertising the Notice of Hearing.

The Appeal seeks to have the Board reverse the Council's decision of February 17, 1986, authorizing the execution of a development agreement with Fundy Housing and Recreation Limited, the Respondent, respecting the proposed development of a mobile home park in an area of the Town near Cornwall Street and Victoria Street West, adjacent to the Town-County boundary presently zoned R-1. The subject property (herein called for convenience of reference the trailer park) is a rectangular piece of vacant property containing approximately 18 acres (The long dimensions of the rectangle are parallel to James Street. The short sides of the rectangle comprising the trailer park are roughly parallel to Cornwall Street.) running parallel to James Street (one lot deep northeasterly therefrom) to within the distance of one lot from the southern boundary of Victoria Street West. The south eastern boundary of the trailer park is parallel to Cornwall Street and approximately one lot to the northwest of the northern boundary of Cornwall Street. The trailer park has street access to both Cornwall Street and Victoria Street West. Mrs. Arenburg's property is at the northwestern intersection of Cornwall Street and Aspen Drive. Her lot is adjacent to a large field (mostly unoccupied) of which the trailer park forms a part. All these areas are graphically shown on Exhibit A2-19.

The appeal came on for hearing at 10:30 a.m. on June 3, 1986, at the Chambers pursuant to the Notice of Hearing dated the 1st day of May, A.D., 1986. Service of the Notice of Appeal, the Amended Notice of Appeal, the Notice of Hearing, and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board.

Mr. Creighton took early objection to the jurisdiction of the Board to hear the appeal on the grounds that the sole Appellant was not an aggrieved person within the meaning of section 71(1)(a) of the Planning Act being c. 9 S.N.S. 1983 and thus had no standing to pursue the appeal. The Board heard argument on this point at the conclusion of the evidence adduced by Mrs. Arenburg and also at the conclusion of all the evidence. The Board reserved on this point and heard the evidence on the merits as well as much evidence as to the status or lack thereof of the Appellant.

[For ease of understanding (and to distinguish it from a very similar appeal before this Board Ruth Arenburg and the Town of Amherst NSMB-495-85-P hereinafter called Arenburg No. 1), this appeal will be referred to as Arenburg No. 2.]

The facts of Arenburg No. 2 are so close to the facts of Arenburg No. 1 which was decided December 31, 1985, that it is almost impossible to find any distinction in fact between them. In Arenburg No. 1 at page 22 of the filed decision, the Board had this to say concerning the Appellant (who was the same person in both appeals),

> "As a preliminary the Board finds on the evidence that the Appellant is an aggrieved person within the meaning of Section 71(1) of the Planning Act and is thus an appropriate Appellant. See Riverlake Residents Association NSMB-448-85-P."

The major difference on the facts (as opposed to the evidence) as the facts affect the merits is the presence of a valid Municipal Planning Strategy (MPS) in Arenburg No. 2 and the absence of the same in Arenburg No. 1. The basic facts relating to the issue of status of the Appellant as an aggrieved person were the same in both appeals even though there was much more evidence called on this issue by the Town in Arenburg No. 2.

The Applicant was the same in both cases. The Appellant was the same in both cases. The Town was the same in both cases. The ownership of the Appellant's home and its proximity to the site of the proposed mobile home park (hereinafter also called the trailer park) were identical. The proposed scheme for the trailer park was very similar in each case. The decisions of Council were passed in each case by large majorities. Despite these great similarities, Mr. Creighton urged the Board that it was not bound by its previous decision on the status of the Appellant (that that decision was in fact wrong) and that the evidence adduced by the Town, mainly the evidence of an accredited appraiser from the Pat King organization, showed that the Appellant had suffered no pecuniary loss in value to her house because of the decision of Council to enter into a development agreement with the Applicant and, not having suffered that pecuniary loss which was the only loss claimed, did not therefore have the loss which is an essential ingredient to the status of aggrieved person and therefore the Appellant was not an aggrieved person.

Mrs. Arenburg strongly maintained the position that, in her opinion, the value of her house would be greatly depreciated by the presence of the trailer park. Two of her home-owning neighbours on the same street and even closer to the proposed trailer park than Mrs. Arenburg (one her sister and one her sister-in-law) testified that they had the same belief concerning the values of their own homes and that they had been so advised by real estate agents. A home owner whose home abuts the proposed trailer park had the same opinion concerning the value of his own home. The Board believes that each person is an expert entitled to give admissable opinion evidence concerning the value of his own home and that valuation, once admitted in evidence, must be weighed together with all other evidence concerning valuation. The Board is entitled to infer that, if 3 other local homeowners (out of a relatively small number located near the trailer park) believe their respective properties were devalued because of the trailer park, that is some corroboration of Mrs. Arenburg's evidence tendered to prove the same type of devaluation had happened to her property.

The Board is further convinced from their demeanour while giving evidence that these four witnesses genuinely believed that the values of their properties were devalued to some significant extent by Council's approval of the subject development agreement. Whether the Council's decision did result in such a devaluation to the Appellant's property can only be determined by this Board when it weighs all the evidence of valuation tendered to it during the course of the appeal.

Mr. Fergus Omond of Pat King Appraisals gave an opinion (fully set out in Exhibit A2-20) that, although he could give no valuation of Mrs. Arenburg's property, its value - whatever that might be - would not be diminished in any way by the trailer park. This type of evidence was accepted as a determinate in the appeal Northwest Arm Heritage Association NSMB-496-85-P. In the Northwest Arm the Appellants who, from their proximity to the disputed site, appeared the most likely persons to qualify as aggrieved persons refrained from giving any evidence of diminution of the value of their respective properties and the Board, in effect, was left with only the evidence of the kind tendered here by Mr. Omond on which to formulate its decision. In this case there is no such lacuna in the evidence adduced by the Appellant concerning her pecuniary loss. The Board would think that before a witness could form the opinion on whether or not a given development would or would not affect the value of a given property he would first have to determine the value of the given property and then decide whether and how much the value of the given property is affected. If he didn't proceed in this manner he wouldn't know the value of the property before the affecting influence came into play, he wouldn't know the value change caused by the affecting factor, and he wouldn't (and couldn't) know the final value of the given property after full application of the effect of the affecting factor. In short he would know comparatively little of the value of the property concerned and yet that is precisely what he purports to measure. To have his opinion evidence accepted by the Board, an appraiser often must come up with better valuation concepts than "bigger" or "smaller", "greater" or "lesser" or "no change", especially when faced with evidence of quantified values followed by more or less quantified effects of the application of the affecting influence to the original value. The Board believes that an appraiser fails to quantify in such circumstances at the peril of having his opinion as to value preferred less than other conflicting opinions as to value proferred in the same hearing. Mr. Omond had never used this "no value before after or during" appraisal technique previously in "planning matters" or in Nova Scotia. This Board, given other witnesses' conflicting opinions as to value in this appeal, prefers their opinions as to the value opinions of Mr. Omond.

The Pat King organization, which from the evidence Mr. Omond's employer forms a part, earned a commission for effecting the sale of the land in question to the present Applicant. To what extent, if any, this fact had influence on the opinion given the Board by Mr. Omond it is difficult to say (for obvious reasons he has put no conventional disclaimer in his report) but the appearance of impartial opinion advice to the Board from an expert is not greatly advanced by such a fact.

As part of his comparables in his report to the property of Mrs. Arenburg, Mr. Omond used two recent sales in the area made by the "Amherst Pat King office". One of those sales was clearly within the time when the possible devaluating effect of the proposal giving rise to Arenburg No. 1 was in effect and the other while the same scheme was probably in the preliminary or negotiation stage yet he, in his testimony or in his report, made no mention of or allowance for this most salient fact.

Mr. Ross Bragg, Manager of Century 21 Real Estate of Amherst, gave evidence of no diminution in value to Mrs. Arenburg's property resulting from the Council decision but his evidence was so general that the Board is of the opinion that it prefers the evidence on that point adduced by the Appellant.

The Board has referred to the cases cited above, to Douglas Benedict and the Town of Truro NSMB-475-85-P, Edward Backman and the City of Halifax NSMB-483-85-P, Robert Fournier and the Municipality of the County of Halifax NSMB-474-85-P and other appeals before the Board on planning matters referring to the definitions of aggrieved persons and has carefully reviewed all the evidence before it on the point and finds that within the meaning of Section 71(1)(a) of the Planning Act the Appellant herein is an Appellant with standing before the Board as an aggrieved person and thus the Board has jurisdiction to hear the appeal. The Board therefore assumes jurisdiction to hear this appeal.

Ruth E. Arenburg, 51 Cornwall Street, Amherst, housewife, the Appellant, was the first person sworn. She said she owned her house situate on a 50' x 100' lot at 51 Cornwall Street. She stated that she signed the Amended Notice of Appeal after the Council meeting of February 17, 1986, most likely on February 24th. She tendered a Petition signed by residents in the area of the proposed trailer park opposed to the proposed trailer park. Mrs. Arenburg testified that there was already one trailer court in "our area" and that contained 90 trailers which are across Cornwall Street from her house. She said the trailer court has 8 vacant lots currently available to be rented out and it is proposed to make 15 more lots in that court available by this summer. She referred to another trailer court down the street "some" between Anson Avenue and West Victoria Street which contains about 35 trailers. In other terms she clearly expressed the view that two trailer courts of the magnitude of those already installed is enough or more than enough for her neighbourhood.

Mrs. Arenburg said the construction of all these new units will, in the natural course of events, result in overcrowding in the West Highlands Elementary School.

Mrs. Arenburg testified as to her opinion and the opinions of others she had solicited as to the value of her home. A summary of the finding of the Board concerning the value of Mrs. Arenburg's house is contained previously in this decision and will not be repeated here.

Mrs. Arenburg felt there would be inadequate playground facilities for the additional children who would be present in her neighbourhood as a result, in the same natural course of events, of the proposed trailer park. She felt the Town had made no real effort to date to provide her neighbourhood with municipal amenities such as parks and sidewalks and she had no confidence that this perceived neglect would be remedied after the population of the proposed trailer park put additional pressure on an already underserviced (in this witness' view) neighbourhood.

Mrs. Arenburg felt that there was no guarantee that the new proposed trailer park would be maintained to the same admitted high standards as were the existing trailer courts already built in Amherst.

Mrs. Arenburg acknowledged she had had in her possession at the latest since the hearing in Arenburg No. 1 (September 18, 1985) a copy of the Planning Act, a copy of the Land-Use By-law for Amherst, and a copy of Amherst's MPS. As well she had a copy of the proposed development agreement. She said she had only glanced at part of the documents involved even though she had in excess of six months to make herself familiar with the planning law as it affected what she perceived to be her interests and the interests of her neighbourhood.

Mrs. Arenburg said the Town some years ago promised the residents of her neighbourhood, to obtain their acquiescence to the installation of the Roymac trailer court (on the opposite side of Cornwall Street from Mrs. Arenburg's house), that the development of the Roymac property facing Cornwall Street would be in conventional single family homes. That area of the Roymac property is now occupied by trailers: Mrs. Arenburg feels herself betrayed by the Town's failure to keep its perceived promise and, consequently, she has no faith in the Town's ability or desire to keep any promise it might make in regard to the proper installation and management of the proposed trailer park.

In the interval since the decision in Arenburg No. 1 (December 31, 1985) neither Mrs. Arenburg nor Mr. Blenkhorn had attempted to enter negotiations with each other to attempt to resolve or to narrow their differences over the proposed trailer park. Mrs. Arenburg had not tried to negotiate a better deal for herself and her neighbours with constructive criticism of the proposed trailer park with the Council and with planning officials engaged in doing the Town's planning work. Apparently all parties concerned maintained their respective positions and individual solitudes and went into a holding pattern while the planning process took its official course. The decision in Arenburg No. 1 specifically refrained from commenting on the planning evidence adduced before it in silent anticipation that the parties involved in that dispute would meet, discuss their differences, and perhaps negotiate to remove or to reduce their differences. One party at least (Mrs. Arenburg) did not take any steps to open such negotiations.

Cecil Smith was the final witness for the Appellant in her evidence-in-chief. He said his house property was located immediately adjacent to the proposed trailer park and that the proposed trailer park had depreciated the value of his property and the properties of his home owning neighbours. To the best of his information his house was reduced in value by some $20,000.00 (from $90,000.00 down to $70,000.00). He said he had signed the petition against the proposed trailer park (Exhibit A2-15).

Mr. Smith, a very long term resident of the neighbourhood, had sold the subject land, inter alia, to a developer who had, at that time, wished to build single family homes on the lands. Over the many years since that sale of bulk land no significant portion of those lands (in terms of its gross area) had been built up in single family homes and the lands were, by and large, still vacant. Mr. Smith believed that the land had not been built in single family homes because it "was over the tracks".

This was the pith and substance of Mrs. Arenburg's evidence in chief on the appeal.

Mr. Creighton then made a motion that, even if Mrs. Arenburg were an aggrieved person, she had not brought any evidence to show that the proposed development did not agree with the MPS which she had the burden to do under the Planning

Act and therefore her appeal ought to be dismissed without putting the town or the Applicant to the burden of calling any further evidence. In essence, according to Mr. Creighton, Mrs. Arenburg had not made out a prima facie case for her appeal. The Board considered his motion. The Board felt that, in the absence of any contradictory evidence and on accepting the evidence before it as true, it would find in favour of the Appellant and thus it ruled that the Appellant had made out a prima facie case.

Mr. Creighton then brought forward his motion to dismiss this appeal on the grounds that there was no proper appellant before the Board (and thus no possibility of an appeal) because Mrs. Arenburg was not an "aggrieved person." The Board reserved on that point and after hearing all the witnesses it decided against the motion as set out more fully above in this decision.

Immediately after the lunch break, Mr. Keith Blenkhorn testified on behalf of the Applicant of which he is the owner. He outlined in detail his experience in the field of trailers, that he calls mini-homes, (both sales and their use in trailer courts), his plans for the proposed trailer park, the steps he, on behalf of the Applicant, took to conduct the proposed trailer park proposal through the planning approval process and he spoke of the Applicant's firm intention of administering the proposed trailer park to at least the high standards of the other competing trailer courts in town.

He acknowledged that the Pat King organization had been directly instrumental in the sales transaction in which the Applicant had acquired the land for the proposed trailer park, but he disclaimed all knowledge of the Town's hiring of someone from a Pat King organization to appraise property in order to prepare and deliver expert opinion evidence to the Board in a hearing involving the land.

Mr. Blenkhorn acknowledged his company's willingness to execute the subject development agreement (Exhibit A2-23) and said it possessed the means and desire to live up to the terms of that agreement.

He testified to the values of the mobile homes which he dealt in and also to the values of Kent Homes (a more "conventional" type of housing) for which he also had a dealership. He felt the trailers which he sold and which he proposed would occupy the spaces in the proposed trailer park would be of high quality and up to all National Building Code standards.

Mr. Blenkhorn felt that a failure of the Applicant to succeed in its present proposal for the proposed trailer park would have serious adverse economic consequences for the Applicant.

The Town called as its first witness Dean Maston, Assistant Town Clerk and Treasurer, who produced the Town's file on the Applicant's proposal for the proposed trailer park (Exhibit A2-24). He also identified many of the other exhibits produced by the Town.

Mr. Maston spoke to the increased assessment and tax revenue which would accrue to the town because of the proposed trailer park.

He said there was no present intention to allow the Applicant any tax concessions for the proposed trailer park. He testified that he estimated the units in the proposed trailer park would contain about 1.25 school child per living unit and the cost for education alone for each child would average about $3,500.00 per child per year so that the costs of education would more than eat up any additional tax revenue accruing to the Town from the proposed trailer park.

Mr. Creighton then called Frank Barteaux, Superintendent of Schools for the Cumberland District School Board. His responsibilities included the supervision of the school system of the Town including the West Highland Elementary School. He holds the opinion that the Amherst school system had absorbed in the recent past more students than the numbers of students expected to be flowing into the Amherst School system from the proposed trailer park. The highest estimate of new students into the system would not bring enrollment at West Highland Elementary School above the enrollment it had served successfully in the late 1970's. Any overcrowding of schools resulting from the extra students attending from the proposed trailer park could be accommodated by administrative accommodations within the school system such as the adjustment of school lodgement area boundaries. Amherst, with its generally shrinking school population, would merely reallocate its existing resources to meet the additional demands generated in the normal course of events by the proposed trailer park.

Rick McCready, planner with the Cumberland District Planning Commission (CDPC), testified that the CDPC was the planning instrument for the Town, the Municipality of the County of Cumberland, and all the municipal units within the County of Cumberland except the Town of Oxford. He was instrumental in drafting the present development agreement. He said he was insructed to treat this second application for a development agreement as an entirely fresh application and to approach the application with an open mind and he did his best to follow those instructions.

In great detail Mr. McCready outlined the procedures he had followed in dealing with the current application. He took great care to investigate all the ramifications of the proposal, to relate it to the MPS and the Land-Use By-law. He said he took care that the members of the PAC and the Council had full reports and explanations before them so they could proceed in their deliberations with the fullest of information he was able to garner about the proposal. In his observation, the Appellant participated in the public meetings of both the PAC and Council and was given full opportunity to "have her say". In his opinion, the instant proposal meets the intent of the MPS and all other planning requirements of the Town and is a proper development of the site.

Mr. Ross Bragg, a realtor doing business in the Town, spoke in favour of the proposed trailer park.

Ronald Patterson, Town Engineer, testified to his function as to the future supervision of the level of compliance of the Applicant with the proposed development agreement in installing new sewer water and street services in the proposed trailer park and in the maintenance and care of the proposed trailer park after it becomes operational. He holds the opinion that, concerning the elements under his control as Town Engineer, the proposed trailer park as proposed is in all respects feasible and in accord with the needs and laws of the Town.

Jens Jensen, Executive Director of the Cumberland District Planning Commision, and Mr. McCready's boss, said he had given Mr. McCready the instructions already recounted by Mr. McCready. As had Mr. McCready, Mr. Jensen qualified himself before the Board as a witness knowledgeable in planning matters as they affected the Town entitled to give opinion evidence concerning the same.

He spoke highly of his confidence in Mr. McCready's abilities and integrity as a planner. He thoroughly reviewed Mr. McCready's work on the instant proposal and he agreed with the opinions and recommendations already expressed by Mr. McCready.

Shirley Michels, 59 Cornwall Street, and Eva Dobson of 57 Cornwall Street gave rebuttal evidence of their dislike of the proposed trailer park and also gave evidence, dealt with earlier in this decision, going to the issue of "aggrieved person."

From the evidence adduced at this hearing the Board notes that the population of the Town is shrinking. It notes that there is no likelihood that the land in question will be developed for the R-1 use for which it is currently zoned in the reasonably foreseeable future. Many factors enter into this conclusion. The location of the "wrong side of the tracks" for Amherst discourages R-1 buyers. R-1 construction in Amherst, as elsewhere, is becoming less common because of the high cost per living unit delivered of such construction as compared to the lower cost per living unit delivered of many other types of residential construction. The economy of Amherst, chronically depressed, does not lend itself to the encouragement of new R-1 construction. These facts may or may not be novel to a casual reader of this decision, but it is clear to the Board on a reading of the MPS that these and other dismal circumstances were foremost in the minds of the Council when they adopted the MPS as a tool to help alleviate the Town's chronic lack of economic progress. The MPS clearly intends to encourage development. Whether or not it should encourage development is not a matter which this Board can even consider. Only the citizens, the Council and the Minister have a role under the Planning Act in the formation of the MPS.

Under Section 71(3) of the Planning Act the Board's duty on appeal is to examine the proposed agreement to determine whether or not the proposed agreement is consistent with the intent of the MPS. [Section 71(5) of the same Act has certain prohibitions to restrict the Board's interference with the decision of Council.]

The Board does not propose to refer at length to the MPS or the By-laws implementing it or the decision of Council made under those auspices and herein appealed. The verbal evidence has been careful and exhaustive and the tendered documents, in particular Exhibit A2-10, the MPS, and Exhibit A2-11, the Land-Use By-law, are available for any who wish to read them. [It bears repeating that the Appellant had full opportunity to study both these documents but did not do so.] A few excerpts from the MPS first may help set the stage for the decision reached by the Board:

cf Introduction (page 1) "1. Preamble...This plan attempts to address planning issues in the context of today's realities including the sluggish economy, ...B. Goals;...(page 2) 1. To encourage residential development to occur: (a) in the form of infilling in existing built-up areas to maximize the use of existing services and facilities;... (page 4) The early 1980's, unfortunately, have seen a reversal of this trend [growth in industrial expansion] with numerous layoffs in both the traditional and newer industries in Town, accompanied by increasing unemployment and out-migration. ...(page 5) The decline in population in the 1976-1981 [6.1%] period cannot, however be attributed solely to economic conditions. A demographic factor...in the Amherst area in recent years has been the tendency for prospective homeowners to leave the town to buy or build a home in the neighbouring rural Municipality ...(page 6) a large part of the reason why Amherst's population base is deteriorating is the shift in population from the Town out to the neighbouring portions of the County. ...(page 7) II POLICIES

1. Housing and Residential Development

1.1 Background...

3. Mobile homes...have accounted for an increasingly high proportion of new dwellings erected since 1974...(page 8) it would be desirable to encourage new housing construction in the Town to ensure population decline does not reach the point where erosion of the tax base or a reduction of provincial grants based on the number of dwelling units becomes a problem. ...The Plan must seek to ensure that...development does not impose major new costs to the Town but rather maximizes the use of existing public services. ...new housing can be accommodated compatibly with existing residential development, ...The growth of mobile home parks...in Amherst indicates a need for policies to ensure such housing is well located and designed from the point of view of the residents of the parks, as well [as]...of the Town overall. (page 16)

POLICY 1.4.1

It shall be the intention of council to consider permitting the development of new mobile home parks ...anywhere in the areas designated "Predominantly Residential" on the Future Land-Use Map by Development Agreement... " (with appropriate safeguards as stated in that policy).

Town planners, PAC, and the Council had the above and all other relevant planning requirements brought before them for their consideration prior to the Council's decision to enter into the development agreement, the subject of this appeal.

The proposed development is, in the view of the Board, in full agreement with the letter and intent of the MPS and thus the Board can find no merit in this Appeal and hereby, pursuant to Section 71(4) of the Planning Act, confirms the decision of Council.

An Order to dismiss this appeal pursuant to Section 29 of the Municipal Board Act will issue accordingly.

DATED at HALIFAX, Nova Scotia this 13th day of June, A.D., 1986.

RICHARD L. WELDON, Member

NOVA SCOTIA MUNICIPAL BOARD.

Annapolis Valley Stock Car Club v. County of Kings

PLANNING--CONTRACT ZONING--REFUSAL TO APPROVE A DEVELOPMENT AGREEMENT TO ALLOW A RACE TRACK--WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S.--PLANNING ACT, SS. 72(1),(4),(5)--KINGS COUNTY M.P.S., SECTION 3.3, POLICY 4; SECTION 5.3, POLICY 11

This is an appeal from a decision of the Council of the Municipality of the County of Kings refusing to approve a development agreement to allow 17.182 acres of land, largely an old gravel pit, to be used as a race track. A Municipal Planning Strategy (M.P.S.) applies to the subject area. The Planning Advisory Committee (P.A.C.) recommended that the activity could take place under a suitable development agreement, and a draft development agreement was prepared by staff. Staff as well as the P.A.C. recommended approval of the development.

HELD: The appeal is dismissed.

One ground of appeal is that Council erred in not following the recommendation of the P.A.C. that a development agreement be entered into. The Board disagrees with the implied assumption that Council should accept the P.A.C.'s recommendation regardless of the evidence at the public hearing. On the other ground of appeal, the Appellant has not established that the decision of Council cannot reasonably be said to carry out the intent of the M.P.S. The M.P.S. would allow this site to be used as an auto race track through a development agreement "provided Council is satisfied that the proposal will not interfere or conflict with other land uses in proximity." Here several significant matters are beyond the Municipality's ability to monitor, approve or control, including the designation of access points, the method of solid waste and effluent disposal and environmental safeguards and control of pollution. The inability of the Municipality to directly monitor, approve or control these matters, together with the concerns expressed by local residents respecting noise, pollution, traffic and trespassing, all support the decision of Council because the proposal would interfere or conflict with other land uses in proximity.

NSMB-504-85-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, 1983, Chapter 9, as amended;

- and -

IN THE MATTER OF: An Appeal by the **ANNAPOLIS VALLEY STOCK CAR CLUB** from a decision of the Council of the Municipality of the County of Kings made December 3, 1985, which refused to approve a development agreement to allow the operation of a race track on a 17.182 acre parcel of land located on the west side of the Parker Road at Factorydale.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: ERIC O. STURK, LL.B., for the Appellant;

JAMES E. DEWAR, LL.B., for the Municipality.

DECISION

A hearing was held by the Board in the Council Chambers of the Municipality of the County of Kings on March 23, 1986, on an appeal by the **ANNAPOLIS VALLEY STOCK CAR CLUB** dated December 12, 1985, and received by the Board December 16, 1985, from a decision of the Council of the Municipality of the County of Kings made December 3, 1985 which refused to approve a development agreement to allow the operation of a race track on 17.182 acres of land located on the west side of the Parker Road at Factorydale. The appeal is made pursuant to Section 72(1) of the Planning

Act.

As stated in the Notice of Appeal (Exhibit A-1), the grounds for the appeal are as follows:

> "1. THAT the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy;
>
> 2. THAT Council erred in not following the recommendation of the Planning Advisory Committee that a Development Agreement be entered into with the Appellant."

At the request of the Board, an Amended Notice of Appeal dated December 20, 1985 was filed which corrected the omission of Schedule "A" referred to in the Notice of Appeal.

Counsel for the Appellant filed an Affidavit (Exhibit A-3) proving service of Notice of Hearing as directed by the Board. It was agreed by the parties that all the necessary preliminary matters having been accomplished, the Board had jurisdiction to hear the appeal on the merits. The Board agreed and accordingly assumed jurisdiction to hear the merits of the appeal.

The subject property is Parcel "D" of the lands of Frederick A. Weihers containing 17.182 acres located on the west side of the Parker Road between Morristown and Factorydale. Parcel "D" is primarily an old gravel pit with frontage of approximately 600 feet on the Parker Road and a depth of approximately 1,100 feet. At the rear of the property, the South Annapolis River lies at the bottom of a steep wooded bank. A power line of the Berwick Electric Commission crosses the property diagonally approximately two-thirds of the distance back from the road. The abutting properties on either side of the subject property are thickly wooded. There is a thin border of vegetation along much of the road frontage of the property.

Three persons gave evidence for the Appellant; none were called by Counsel for the Municipality. One person residing in the area of the subject property gave evidence on his own behalf in opposition to the proposed development.

Robert Elliott, Director of Planning for the Municipality for 14 years, gave evidence on the development of policies in the Municipal Planning Strategy (MPS) relevant to the development agreement for the proposed stock car race track. Referring to Exhibit A-5, the "County of Kings Municipal Development Plan, Vol. 1" (M.P.S.) approved by the Minister on May 22, 1979, Mr. Elliott pointed out that the site which is the subject of this appeal is located in an Agricultural District as designated in Section 5.3 of the M.P.S. Additionally the subject site was originally designated as having Class 3 soils, as identified on the Canada Land Inventory Survey (C.L.I.) Agricultural Soil Capability Map of the Municipality. Policy 11 in Section 5.3 of the M.P.S. therefore was applicable to the subject property. Policy 11 states:

> "Policy 11 It shall be the policy of Council to prohibit within the Agricultural District the location of non-agricultural development on class 2 and 3 soils as identified on the C.L.I. Agricultural Soil Capability Map of Kings County unless otherwise stated in this Plan."

Mr. Elliott stated that changes had been made to this section of the M.P.S. because of its perceived inflexibility. Amendments were made to Policy 11 of Section 5.3 by changing it to Policy 11(a) and by adding subsections (b) and (c) to allow the reclamation of abandoned quarry and pit sites, as follows:

> "Policy 11(b) To allow the reclamation and development of abandoned resource extraction sites it shall be Council's policy to exempt sand pits, gravel pits and quarries as identified under the criteria of Policy 5.3 11(c) from the prohibition of development in Policy 11(a).
>
> Policy 11(c) To identify locations of abandoned and current resource extraction sites it shall be Council's policy to consider those sites shown as gravel or borrow pits or quarries on the Sand and Gravel Occurrances map series produced by the Nova Scotia Department of Mines and Energy or a site for which a permit for extraction has been issued by the Nova Scotia Department of Environment."

The subject site is so identified on mapping of Sand and Gravel Occurrances.

These amendments to the M.P.S. were approved by the Council of the Municipality of the County of Kings, August 6, 1985, and by the Minister of Municipal Affairs on October 18, 1985. An earlier amendment to the M.P.S. was approved by Council on April 1, 1980, which added a policy to Section 3.3 (Commercial) of the M.P.S. as follows:

> "Policy (4)
>
> Due to the unpredictable demand and potential land use conflicts associated with auto, stockcar, motorcycle and go-cart tracks and similar or related facilities, it shall be the policy of Council to permit these uses

under Section 33(2) of the Planning Act, 1969 provided Council is satisfied that the proposal will not interfere or conflict with other land uses in proximity. Approval shall only be granted in accordance with the terms and conditions stated in a development agreement required by the Municipality under Section 34(1) of the Planning Act, 1969. The development agreement shall not require an amendment to the Zoning By-law but shall be binding to the property until the agreement, or part thereof, is discharged by the Municipality. A site plan of the proposal shall form part of the agreement. The conditions of the agreement may regulate any of the following and other criteria Council may deem necessary:

(a) Landscaping including natural or artificial buffering to reduce potential conflict;

(b) Architectural compatibility with existing and neighbouring structures in terms of design, scale and building materials;

(c) Natural or artificial buffering;

(d) Access, traffic circulation and parking;

(e) Minimum and maximum size of lots and yard requirements;

(f) location, height, number of stories, area and bulk of buildings and other structures;

(g) Percentage of land that may be built upon, building lines, and the size of yards, courts, and other open spaces;

(h) The public display of advertisements including the nature, kind, size and description of any advertisement displayed;

(i) Method of solid waste disposal, effluent disposal;

(j) Environmental safeguards;

(k) Control of pollution, emmissions of smoke, fumes, gases, dust, noise;

(l) Hours of operation;

(m) Performance bonds;

and shall not otherwise be inconsistent with this Plan."

Mr. Elliott noted that the Appellant's application for a development agreement allowed by Policy 4 of Section 3.3 of the M.P.S. which was received by the Municipality on May 6, 1985, could not be processed by the Municipality until the M.P.S. amendments allowing development on abandoned resource extraction sites were approved by the Minister on October 18, 1985.

Mr. Fred Wendt, Development Planner with the Municipality, gave evidence on the processing by the Municipality of the Appellant's application. It was his responsibility to compare the application to the relevant policies of the M.P.S. and to solicit comments from other government agencies. In the case of this application, he notified the Department of the Environment, the Department of Transportation, the Department of Health, the Amusement Regulations Board, the Berwick Electric Commission and the Federation of Agriculture. With the information gathered from these sources, Mr. Wendt wrote the Staff Report for the Council's Planning Advisory Committee (PAC) which was presented to PAC on July 3rd and which concluded that "a development agreement can be drafted which reduces conflict and impact on adjacent uses". At the direction of PAC Mr. Wendt drew up a draft development agreement which PAC reviewed and approved with minor modification on July 31st. The public hearing was not held until November

28th, following the approval of necessary amendments to the M.P.S.

In the course of this process, Mr. Wendt said that he visited the proposed site several times. He described it as a "fairly well worked out" gravel pit surrounded by woods on three sides, sloping from front (roadside) to back at two levels.

Mr. Wendt filed two maps showing the location and numbers of residences in the area of the subject property. Exhibit A-8 shows the location of residences on Hall Road, Harmony Road, Canaan Road, Sturk Road, Prospect Road and Parker Road. This information was added to an L.R.I.S. topographic orthophoto map, Sheet 21A/15-Y3 (Nicholsville) by Planning Staff of the Municipality and dated February 24, 1986. Exhibit A-8 shows two circles centred on the subject property of ¼ mile and ½ mile radius respectively which indicate that there are 10 residences within ¼ mile of the proposed development and 34 residences (24 + 10) within ½ mile of the site.

Exhibit A-7 is a map of the area surrounding the proposed development extending as far north as Aylesford East (at the intersection of the Parker Road and Highway 1). The map is entitled "Approximate Location of residence of Petitioners re: Stock Car Race Track, Factorydale, February 27, 1984", and distinguishes by coloured markings those "opposed", "in favour", "stock car club member" and "club member in favour". Exhibit A-7 was prepared by Municipal

Planning staff to illustrate for Council the residences of persons who had signed the two petitions presented to Council at the public hearing on the proposed development.

Mr. Wendt indicated that there were no other auto race tracks in the Municipality and no other applications made under the M.P.S. amendments of 1980 allowing such uses.

Commenting on the terms of the development agreement Mr. Wendt said that Section 7 of the agreement set out maximum numbers of parking spaces and that the hours of operation of the race track as defined by Section 13 were similarly maximums. Section 7 and 13 read as follows:

> "Section 7 - PARKING
>
> (a) All parking spaces for vehicles using the Property shall be situated on the Property of the Developer.
>
> (b) Parking shall be provided at the rate of one (1) space of not less than 3 meters by 6.1 meters (10 feet by 20 feet) in dimension and 18.6 square meters (200 square feet) in area for every three (3) seats available to spectators.
>
> (c) The Developer shall maintain the parking area with a stable surface that it treated to prevent the raising of dust or loose particles.
>
> (d) Where the parking are is covered by a permanent hard surfacing, each parking space shall be clearly demarcated and maintained as such. The parking area shall be located not closer than 6.1 meters (20 feet) from any lot line.
>
> (e) The parking area shall be located not closer than 6.1 meters (20 feet) from any lot line.
>
> (f) Traffic aisles leading to and within parking areas shall be a minimum width of

> 3 meters (9.8 feet) for one-way traffic, and a minimum width of 6.1 meters (20 feet) for two-way traffic.
>
> (g) The parking area shall be located in the area designated as such on the Site Plan.
>
> Section 13 - HOURS OF OPERATION
>
> (a) The Property shall be open to the public only between the hours of 1:00 p.m. and 7:00 p.m. local time on Saturdays and Sundays.
>
> Participants of races to be held on the Property shall be permitted to use the Property, in addition to the hours listed in subsection (a), between the hours of 5:00 p.m. and 9:00 p.m. local time on Thursdays and Fridays."

Mr. Wendt said that new concerns had been raised at the public hearing on this application which had not been previously raised by the PAC, however Council had not suggested modifications after the hearing of November 28th and before Council made a decision on the application on December 3rd.

In cross-examination Mr. Wendt was asked how the matters enumerated in Policy 4 of Section 3.3 of the M.P.S. were proposed to be regulated by the draft development agreement. He discussed the 13 subsections of Policy 4 with regard to their applicability to the proposed development and their treatment in the draft development agreement.

With regard to Section (a), "landscaping including natural or artificial buffering to reduce potential conflict", Mr. Wendt cited item 9 of the draft agreement which states:

> "Section 9 - LANDSCAPING AND BUFFERING
>
> A vegetative buffer shall be established and maintained in the areas designated on the Site Plan. Such buffer shall be at least 6.1 meters (20 feet) wide and maintained with vegetation at least 3 meters (9.8 feet) high

> above the surface Parker Road and of sufficient density to obscure vision onto the Property through such buffers."

Mr. Wendt also believed that the site had natural buffering, on both sides and to the rear of the property.

Section (b) of Policy 4 in Section 3.3 of the M.P.S., "Architectural compatibility with existing and neighbouring structures in terms of design, scale and building materials", was not applicable to the proposed operation or its rural setting in the opinion of Mr. Wendt.

Section (c), "natural or artificial buffering", had already been addressed by the existing tree buffers around the site, and by the slope of the property which ensured that a track located toward the rear would be recessed in relation to visibility from the road.

Section (d), "access, traffic circulation and parking", was dealt with by two items in the draft development agreement as follows:

> "Section 4 - VEHICULAR ACCESS
>
> (a) Vehicular access to the Property shall only be directly from the Parker Road. The developer shall construct no more than two (2) access points which shall be a maximum of 11 meters (36 feet) wide and shall be located in the area designated as such on the Site Plan.
>
> Only (1) access point designated as 'Participants and Emergency Vehicles Only' on the Site Plan shall be for the exclusive use of participants of events being held on the Property and emergency vehicles and shall not be used for general spectators.
>
> and
>
> Section 8 - PARKING (as previously quoted on

Page 8)."

Mr. Wendt pointed out that the vehicular access to the site had been determined by the Department of Transportation which had considered the 3 original access points proposed by the Applicant and had reduced the number to 2 and changed the location of one for which approval was given. The parking area designated on the Site Plan is shown to be toward the front (road) portion of the property.

Section (e) "minimum and maximum size of lots and yard requirements," was not applicable to the proposed commercial operation Mr. Wendt felt.

Section (f), "Location, height, number of stories, area and bulk of buildings and other structures", was dealt with in item 8 of the draft development agreement, which states:

> "Section 8 - BUILDINGS AND STRUCTURES
>
> The Developer may construct buildings and structures only in accordance with the Site Plan and the following:
>
> (a) No Building or Structure shall be located less than 13.7 meters (45 feet) from the front lot line; 6.1 meters (20 feet) from a side lot line; nor 12.2 meters (40 feet) from the rear lot line; nor exceed 16.7 meters (55 feet) in height.
>
> (b) A maximum of two (2) grand stands are permitted to be built on the Property and shall not exceed a combined total seating capacity of 1,500 people.
>
> (c) All Buildings and Structures shall conform to the Building By-law of the Municipality."

Additionally item 3 of the draft agreement provides that "the property shall be developed in accordance with the Site Plan attached to this Agreement as Schedule 'B'" The Site Plan shows one grand stand at the rear (west) corner of the property and another between the rear of the parking area and the Berwick Electric Commission right-of-way.

Section (g), "Percentage of land that may be built upon, building lines, and the size of yards, courts, and other open spaces", was not applicable to the proposed development in Mr. Wendt's opinion.

Section (h), "The public display of advertisements including the nature, kind, size and description of any advertisement displayed," was dealt with in item 10 of the draft agreement which states:

> "Section 10 - SIGNS
>
> (a) The Developer may erect two (2) ground signs not exceeding 3 square meters (32.3 square feet) in size each in the location shown on the Site Plan.
>
> (b) The Developer may erect signs not exceeding 0.4 square meters (4.3 square feet) in size each to identify buildings and structures on the Property and to indicate traffic circulation routes and parking areas.
>
> (c) All signs shall be located on the Property and shall not be located less than 3 meters (9.8 feet) from a property line."

The location of the signs referred to in Subsection (a) is on either side of the main road access to the site, located approximately 50 feet from the north boundary of the property.

Section (i), "Method of solid waste disposal, effluent disposal" is dealt with by item 5 in the draft agreement which states:

> "Section 5 - SEWAGE DISPOSAL SYSTEM
> The Developer shall install a system suitable to the Department of Health for the disposal of sewage and effluent."

Section (j), "Environmental safeguards", was dealt with in item 12 of the draft agreement which states:

> "Section 12 - STORAGE OF GASOLINE AND RELATED PRODUCTS
>
> The storage of gasoline and related products and the disposal of waste oil shall be in accordance with guidelines and regulations of the Department of Environment."

Mr. Wendt commented that the Department of Environment was principally concerned with gasoline and oil storage and that the Municipality relied on the Department for advice on environmental hazards and enforcement of environmental safeguards.

Section (k), "Control of pollution, emission of smoke, fumes, gases, dust, noise", was dealt with as far as dust is concerned in item 7(c) of the draft agreement. Mr. Wendt acknowledged that he had not researched any data on possible noise levels of an operation such as the proposed auto race track and that the buffering by trees or distance would be the principal means of noise control. Control of "pollution, emission of smoke, fumes [and] gases", where applicable would be the responsibility of the Department of Environment.

Section (l), "Hours of operation", was dealt with in item 13 of the draft agreement which states:

> "Section 13 - HOURS OF OPERATION

> (a) The Property shall be open to the public only between the hours of 1:00 p.m.and 7:00 p.m. local time on Saturdays and Sundays.
>
> (b) Participants of races to be held on the Property shall be permitted to use the Property, in addition to the hours listed in subsection (a), between the hours of 5:00 p.m. and 9:00 p.m. local time on Thursdays and Fridays."

Section (m), "Performance bonds", was not dealt with directly, although item (25) in the draft agreement covers the termination of the agreement as follows:

> "Section 25 - TERMINATION
>
> In the event that the land or buildings covered by this Agreement should become surplus or unnecessary for the purposes of the Developer or shall fall into disuse for a period of six months, this Development Agreement shall terminate."

In conclusion Mr. Wendt said that both he as the author of the Staff Report and PAC recommended approval of the development to Council on the basis that the proposed development met the general guidelines of the M.P.S. policies and that the draft development agreement addressed the major concerns which might arise from such a use. The vote on the question at Council, however, was 11 to 1 opposed.

Mr. John Drew, President of the Annapolis Valley Stock Car Club, a non-profit organization whose memorandum of association and by-laws dated April 9, 1985, were filed as Exhibit A-10, gave evidence on the intentions of his organization in regards to the proposed race track on the subject property. Mr. Drew is retired from the Canadian

Armed Forces. He works part-time with the Air Cadet League and formed the club in early 1984 primarily for young people in the area.

Referring to Schedule "B", the Site Plan accompanying the proposed development agreement, Mr. Drew said that only the track layout was "firm" and that other proposed elements in the operation were long term goals of his organization. He commented that lights for the track were not applicable because of the limitations in the proposed agreement on hours of operation. He confirmed that the row of trees along the power commission transmission line would be retained and expressed willingness on behalf of his Club to accept tighter regulations and to negotiate these with the Municipality.

Mr. Drew said that his organization planned initially to hold races on Sundays only, "every other week". In his opinion the number of races to be held would depend on the total number of cars entered, with 7 or 8 races needed if 30 cars were entered, and reductions accordingly if fewer cars were entered. Mr. Drew said that his club was prepared to negotiate the allowable number of races and number of cars, with 15 - 25 cars the usual number in a race but 10 - 15 a "good race" for the public. He confirmed that the proposed track is ¼ mile in length, that there are no other such tracks in the Annapolis Valley and that tracks formerly operating in Yarmouth and in Onslow were now closed. Mr. Drew expected that the season for the proposed race track would be from June to September or October each year, with 8 to 12 race days in a season initially.

In cross-examination Mr. Drew was unable to answer whether or not the club would hold snowmobile races on the subject property. Mr. Drew said that his organization had 27 car owners currently and 68 associate members, and that he knew of 50 - 60 people who were interested in racing.

Mr. George Smith a resident property owner for 16 years on Harmony Road to the south of the subject property with ½ mile distance, gave evidence on his own behalf on the reasons for his opposition to the proposed auto race track. Mr. Smith filed a brief (Exhibit A-11) and additional notes (Exhibit A-13) and 6 colour photographs taken by himself in the vicinity of the subject property.

Exhibit A-11 lists 9 objections to the proposed auto race track which Mr. Smith said were arranged in priority order as follows:

1. Locale;
2. Noise; Dust and Garbage Pollution;
3. Traffic Problems;
4. Policing;
5. Lowering of Property Values;
6. Great Monetary Gains to One Family;
7. Quality of Life;
8. Other Locations;
9. Petitions.

Mr. Smith asked that objection number 6 be down-graded.

Mr. Smith said that the noise from the former gravel pit operation on the subject property had been clearly heard in the surrounding area during its 10 years of operation which ceased in the summer of 1985. He pointed out that whereas that operation was conducted during working hours on weekdays, the proposed auto racing would be conducted in the evenings and on weekends when local residents particularly wished to enjoy peace and quiet in their leisure hours. The subject property is currently used by local dirt-bike operators he said and the sound of those vehicles carries clearly for a long distance and funnels through "the notch" formed by the steep banks of the South Annapolis River which flows along the west boundary of the site.

With regard to the problem of garbage Mr. Smith stated that the concerns of the area residents were not so much with pollution on the site itself but with the possibility of garbage from those using or visiting the operation overflowing onto adjacent properties, or over the steep bank at the western (rear) boundary of the property to the unpolluted South Annapolis River below, or along the Parker Road from the site entrance to the fast food outlet "a couple of hundred yards down the road".

Mr. Smith anticipated that a possible weekend race schedule would lead to spectators and/or competitors staying overnight between races and since the nearest accommodation was 12 miles away he believed that this "influx of people" might end up camping on adjacent properties.

Mr. Smith expressed several concerns about potential traffic problems. He was particularly concerned about a "dip" in the Parker Road which he said was directly in front of the proposed entrance to the subject property. According to Mr. Smith, the sight distance to the south from the exit point was only about 75 feet and to the north about 100 feet.

In addition to the sight distance problem Mr. Smith stated that Parker Road was the main access road to the Lake George Provincial Beach and Aylesford Lake cottage area to the south and that homeward bound summer traffic on weekend evenings was especially heavy because of this. He believed this traffic flow would conflict with the traffic exiting after the end of the races, and that the problems would be compounded by the poor sight distances southward from the exit from the subject property.

The narrow shoulders on the Parker Road, its extra summer traffic load and the existing local pedestrian traffic to and from the store in Factorydale all combined to increase traffic hazards in his opinion. As well, Mr. Smith speculated that some of those attending the proposed auto races might park along the Parker Road "to avoid parking fees at the track", which would compound traffic safety problems.

Mr. Smith expressed uneasiness about the ability of the local R.C.M.P. detachment at Kingston (10 miles away) to effectively police the proposed auto race track which he believed would be necessary.

In summary, Mr. Smith believed that the proposed auto race track would alter the rural quality of life of the area, creating noise, traffic problems, pollution, and diminished property values for the existing residents to the benefit of mainly non-residents.

In cross-examination Mr. Smith agreed that crowd control before and after races was a major concern, particularly if it resulted in traffic problems and trespassing. Mr. Smith believed that even if the subject property were fenced the private access route currently used by snowmobilers and bikers over a privately-owned woods road would be used by patrons of the race track. The current occasional use of the subject property by one or two off-the-road vehicles at a time during daylight hours would probably continue he felt. He agreed that the subject property in an undeveloped state would be used by recreational vehicles on an unorganized small scale. Mr. Smith's particular concerns were the vehicular access, parking and hours of operation of the proposed race track. He did not feel that the development agreement could be "tightened up". While he expected that the proposed hours of operation would be adhered to he still believed that an auto race track operation conflicts with the rural and residential lifestyle of the people in the area.

A determination by the Board in an appeal such as this, filed pursuant to Section 72(1) of the Planning

Act, is governed by Sections 72(4) and (5) of the Act which state:

> "(4) The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall
>
> a) refer the matter back to the Council; and
>
> b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant.
>
> (5) A determination of the Board pursuant to subsection (4) shall contain reasons for the determination."

Following the conclusion of the hearing Counsel for the Appellant and the Municipality submitted briefs. The Board has visited the site, accompanied by Counsel for the Appellant and the Municipality and considered the evidence from the public hearing and from the post-hearing briefs. The Board determines that the Appellant has not established that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy, which was its first ground of appeal, or "that Council erred in not following the recommendation of the Planning Advisory Committee that a Development Agreement be entered into with the Appellant", which was the second ground of appeal.

With regard to the latter ground of appeal, the

Board disagrees with the implied assumption that Council should accept the PAC's recommendation regardless of the evidence introduced at the public hearing, an assumption which would result in the final decision being made in effect by a committee of Council rather than by Council itself.

The expert planning evidence given at the hearing clearly indicated that the area in which the subject property is located is zoned agricultural and subject to the policies of Section 5.3 of the M.P.S. That Section of the M.P.S. states in its introduction:

> " In the designated Agricultural District all policies are tailored to a framework that will benefit agriculture, the most valuable primary resource in Kings County. The district is delineated as areas outside of the growth centres and hamlets in which a minimum of sixty per cent of the land is either in agricultural production or is classified by the Canada Land Inventory Survey as class 2 or 3 agricultural soil capability."

The specific policy (Policy 11) prohibiting non-agricultural development on class 2 and 3 soils has been modified by an amendment to the M.P.S. to allow the reclamation and development of abandoned pits and quarries which is applicable to the subject property. The Appellant's intent to develop the site as an auto race track is subject to Policy 4 of the M.P.S., Section 3.3 (Commercial) which allows such a development by agreement only, "provided Council is satisfied that the proposal will not interfere or conflict with other land uses in proximity".

Of the 13 matters listed in Policy 4 as conditions which may be regulated by the development agreement several significant matters are beyond the Municipality's ability to monitor, approve or control according to Mr. Wendt the development planner responsible for drawing up the draft development agreement. These include the designation of the access points to the property from the Parker Road (the prerogative of the Provincial Department of Transportation), the method of solid waste and effluent disposal (the responsibility of the Provincial Department of Health) and environmental safeguards and control of pollution (the responsibility of the Provincial Department of the Environment).

In the opinion of the Board the inability of the Municipality to directly monitor, approve or control these matters, together with the concerns expressed by local residents who anticipated problems with noise, pollution, traffic and trespassing, all support the decision of Council to refuse to approve the development agreement to permit the operation of an auto race track on the subject property because the proposal would interfere or conflict with other land uses in proximity.

The Board accordingly confirms the decision of the Council of the Municipality of the County of Kings made December 3, 1985, which refused to approve a development agreement to permit the operation of an auto race track by the Annapolis Valley Stock Car Club, on property located on the west side of Parker Road at Factorydale near Morristown.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of July, A.D., 1986.

E A Salton

ELIZABETH SALTON
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD

Black v. Town of Amherst

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-2 TO C-4 TO PERMIT A CONVENIENCE STORE--WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S.--WHETHER UNDUE HARDSHIP--WHETHER EXTRAORDINARY AND COMPELLING CIRCUMSTANCES--MUNICIPAL BOARD ACT, SS. 16(1), 29--PLANNING ACT, SS. 63(1)(b),(3),(4),(7)--AMHERST M.P.S., POLICIES 1.5.2, 1.5.3

This is an appeal by R.G.B. from a decision of the Council of the Town of Amherst refusing to rezone her house lot from R-2 (Medium Density Residential) to C-4 (Local Commercial) to permit the modification of her house to contain a convenience store. The neighbours of the Appellant are overwhelmingly in favour of the proposed convenience store. The Town has a Municipal Planning Strategy (M.P.S.).

HELD: The appeal is dismissed.

Policies 1.5.2 and 1.5.3 of the M.P.S. prohibit the Town from creating any more C-4 zones in the Town. Thus the decision of Council refusing to rezone reasonably carries out the intent of the M.P.S. If the Board had a discretion to decide on straight humanitarian and subjective grounds it would have no trouble finding for the Appellant. The appeal cannot succeed under s. 63(7) because even though there may be hardship on the Appellant, the evidence is evenly balanced and the Appellant has not met the burden of proving "hardship" to a balance of probabilities. Likewise no evidence gives rise to the presence of any extraordinary and compelling circumstances. If the Appellant wishes Council to accommodate her proposal, she must ask Council to alter the M.P.S.

NSMB-510-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An appeal by RUTH G. BLACK of Amherst, Appellant, from the decision of the Council of the Town of Amherst, Respondent, made on February 17th, 1986 refusing the Appellant's application to rezone her property at 10 Redland Avenue Amherst from R-2 (Medium Density Residential) to C-4 (Local Commercial), to permit the Appellant to construct and use on her property a "convenience store".

BEFORE: RICHARD L. WELDON, Member

COUNSEL: PETER E. BELLIVEAU, LL.B., on behalf of the Appellant;

BRIAN S. CREIGHTON, LL.B., and
PAUL MUIRHEAD, Student Para-Legal,
for the Town of Amherst, Respondent.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this Planning Appeal at the Board's June 4, 1986 sittings at the Council Chambers (hereinafter called the Chambers) of the Town Council of the Town of Amherst (hereinafter called the Council), Ratchford Street, Amherst, N.S. [The Town of Amherst will hereinafter be referred to as the Town]. This appeal is made by the Appellant, on Notice filed with the Board March 7, 1986 and dated March 5, 1986. The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman decided the Notice complied with the Planning Act and the Rules made thereunder. The Appellant undertook to pay the costs of advertising the Notice of Hearing. The Appeal seeks to have the Board reverse the Council's decision of February 17, 1986 refusing to rezone the house lot (hereinafter referred to as the home) on which stands the house of the Appellant at 10 Redlands Avenue in Amherst from its present zoning of R-2 (Medium Density Residential) to C-4 (Local Commercial) in order that the Appellant might modify her dwelling to contain a small convenience store and there to provide convenience store service to her immediate neighbourhood. The home is a conventional size lot on the edge of a mixed use neighbourhood (located near the toe of the marsh) adjacent to a large expanse of vacant marsh some of which has been recently rezoned for trailer park purposes.

The appeal came on for hearing at 10:30 A.M. on June 4, 1986 at the Chambers pursuant to the Notice of Hearing dated the 1st day of May, A.D., 1986.

Service of the Notice of Appeal, the Notice of Hearing, and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board. The Affidavit of Service of the Notice of Hearing sworn to and prepared by Mr. Belliveau is correct in the most classical sense and would serve as a model to others for the format and content of such Affidavits within the Rules made under the Planning Act. All parties present at the hearing agreed that, as a dissatisfied Applicant, the Appellant had a right to Appeal and that the Board had jurisdiction to hear the appeal within the meaning of Section 63(1)(b) of the Planning Act being c.9 S.N.S. 1983. The Board therefore assumed jurisdiction to hear this appeal.

Mr. Belliveau, in his opening remarks, described the Appellant's neighbourhood and emphasized its unity as a social organism and its compactness as a geographic entity somewhat isolated from the rest of the Town by railway tracks and busy arterial highways and hemmed in by the outskirts of the vacant marsh. He suggested the affluent residential areas of the Town were located elsewhere and the relative isolation of the area would seem to call for the services of a convenience store such as proposed by the Appellant.

Mr. Creighton remarked that there was a C-4 zoned area (on which there was located an unused convenience store) in the neighbourhood and there were several existing C-4 zones within a kilometer of the neighbourhood which contained active convenience stores. As a matter of law, he submitted that the Municipal Planning Strategy (MPS) of the Town, particularly Policies 1.5.2 and 1.5.3, prohibited Council from rezoning to make any more C-4 zones and that the decision of Council thus fell within the intent of the MPS and the Board could only find that the test of s.63(3) of the Planning Act would show such compliance with the intent of the MPS. He submitted that the Appellant's only hope to succeed in this appeal would be to fit herself within the provisions of s.63(7)(a) or (b) of the Planning Act or both of those subsections.

The Appellant called Frederick Blenkhorn, Corrine Porter, Mary Mitton, a Mr. Rhindress, and Shirley White. These witnesses fleshed out the definitions of neighbourhood advanced in the opening remarks of Mr. Belliveau and proved the representations as to fact made in the carefully made opening remarks of Mr. Belliveau.

These witnesses proved, and the Board accepts as fact, that the neighbours of the Appellant were overwhelmingly in favour of her proposal to open a convenience store. They felt the loss of convenience stores which had been previously located within the neighbourhood. They showed a high degree of respect for the character and ambition of the Appellant in her attempt to better her financial position and stabilize her employment situation with a self-employment opportunity located right in her own home. None of these witnesses were able to make any financial predictions concerning the chances of the Appellant's proposal succeeding.

Mrs. Black, (the Appellant), a housewife, with no trade or educational training unexpectedly and prematurely and very suddenly became a middle-aged widow with a teenage son to support. Prior to her husband's early death, her husband had been the full financial supporter of the Black household. On his death, the Appellant received the home and some life insurance (of which she still has some $20,000.00 left in secured term investments) and not much else on which to maintain herself and her son. A pension she now receives on account of her son will cease when he attains a certain age which time is rapidly approaching. She feels that her convenience store would allow her to work of its location way off the beaten track, had a very slight chance to succeed economically.

Frank Elliott, a successful convenience store operator in the Town, purchased Mr. Joseph's closed convenience store after it was closed (and incidentially thereby obtained control of one of the limited number of lots in the Town already zoned C-4) and has not yet opened a convenience store on the site. He says he has alternate plans for reconstruction or remodeling and he has not yet decided which to do, but he plans a convenience store on the site "in the fullness of time". He also expressed grave doubts that the Appellant's proposal was economically viable.

The Town also called Richard Mcready and Jens Jensen both Planners from the Cumberland District Planning Commission, which body provides the expert planning advice for the Town. Their expert opinion was that the Appellant's proposal flew in the face of the MPS for the reasons stated in Mr. Creighton's opening remarks.

During the lunch break, Mr. Belliveau, accompanied by Mr. Paul Muirhead, escorted the Board on a windshield view of the home and the neighbourhood and those parts of Amherst that any of the persons present thought useful and which had also been mentioned in the evidence to date or likely to be mentioned in any subsequent testimony to be heard by the Board in the remainder of the hearing.

right in her home and would, in the short run, provide employment for her and her son as well. If the business were reasonably successful, Mrs. Black would wish to be able to pass the business along to her son and give him a start in life.

Mrs. Black has worked in other convenience stores in the Town. Based on that experience, she feels that, within the $20,000.00 parameters she has set for her proposal, she could fill her neighbours' desire for a convenience store and, in her words, "keep myself off the welfare rolls". No one can, and at the hearing no one did, question this most laudable ambition of the Appellant. Health considerations, as well as the generally slack economy of the Town and the lack of marketable skills of Mrs. Black make it very difficult for Mrs. Black to find appropriate gainful employment in Town outside her home. Be that as it may, the Appellant evinced a very strong desire to continue to live out her life in the Town and, if at all possible, to ensure that her son, if he wishes, could do the same. This determination in the face of the difficulties speaks well of Mrs. Black, but it also speaks well of the Town as a place to make a home.

The final convenience store located within the neighbourhood to close down had been owned by Richard Joseph who was called by the Respondent as its first witness. He gave the Board the benefit of his unsuccessful experience as a convenience store owner and operator in the Town, and specifically within the neighbourhood, and he felt that the Appellant's proposal, because

At the conclusion of all the evidence, oral argument was made on behalf of both Parties and a time was set for the delivery of optional written memoranda. Each Party opted to deliver a written memorandum and each memorandum was both helpful and delivered within the time allowed. The Board wishes to commend both Counsel for their high degree of preparation for this appeal and the thorough way in which each conducted his part of the hearing.

The Board notes that the MPS (Policies 1.5.2 and 1.5.3) prohibits the Town from creating any more C-4 Zones in the Town and thus the decision of the Council refusing the rezoning asked for by the Appellant reasonably carries out the intent of the MPS within the meaning of s.63 (3) of the Planning Act.

If the Board had discretion to decide on straight humanitarian and subjective grounds it would have no trouble of finding for the proposals of the Appellant.

The Board does not have the luxury of indulging in any such subjective feelings or at least cannot allow those feelings to determine whether and how it must exercise its discretion under s.63(7) of the Planning Act which reads as follows:

> " Notwithstanding subsections (5) and (6) The Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship;
>
> or
>
> (b) extraordinary and compelling circumstances are present."

S.S.(6) has no application in this appeal since the Town has an MPS and ss.6 only deals with a situation in which no MPS exists.

S.S.(5) reads as follows:

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

As the Board has found that, under ss.(3), that the decision of Council reasonably carries out the intent of the MPS, it may have the further duty to consider the appeal under ss.(5) and not to allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the MPS. If the Board has such a duty under ss.(5) then ss.(7) may be invoked by an Appellant (and this Appellant in particular) in an attempt to overturn the decision of Council.

For the purposes of this decision The Board begs the question, given its finding under ss.(3) on whether or not it has a discretion to exercise under ss.(7). In John J. MacDonald v. the Town of Westville (1985) Vol "4B" MB 32 the Board has, on at least one prior occasion, exercised its discretion under ss.(7).

There may be hardship on the Appellant in the decision of Council concerning her proposal, but the Board is evenly balanced on the evidence, even to the extent of "hardship", so it must decide in favour of the Respondent since the burden of proving "hardship" to a balance of probabilities is on the Appellant.

The Board does not therefore have to determine whether there is an "undue" element to the "hardship". If the Board had such a duty, then on the facts of this appeal, as accepted into evidence, there would be no "undue" element in any such "hardship". The Appellant cannot, therefore succeed under s.s. (7) (a).

No evidence gives rise, in the opinion of the Board, to the presence of any extraordinary and compelling circumstances. Thus the Appellant cannot get any appeal relief under ss.(7)(b) and the Board may refrain from deciding whether it has discretion under ss.(7) and, if it has, whether it should exercise that discretion in favour of the Appellant.

Having said all this, the Board notes that neither the Council nor the Board had any option (given the nature of the application being considered) or any power to rezone the home in the face of the express prohibition in the MPS. If the Appellant wishes Council to accommodate her proposal, she must ask Council to alter the MPS so that Council might have some discretion to grant her the rezoning she seeks.
Town Planners, PAC and the Council had the above and all other relevant planning requirements brought before them for their consideration prior to the Council's decision to refuse this rezoning application, the subject of this appeal.

The proposed rezoning is, in the view of the Board, in total contradiction to the letter and intent of the MPS. The rezoning refusal decision of Council does not cause, in the opinion of the Board, undue hardship to the Appellant within the meaning of s.63(7) of the Planning Act and, again in the opinion of the Board, no extraordinary and compelling circumstances are present within the meaning of s.63(7)(b) of the same act. If ss.(7) has any application at all, it is to serve as a safety valve when extraordinary and compelling circumstances (or where an applicant would suffer undue hardship) cause pressures to build up from a legal decision of a council and there is no other quick way to relieve the pressures. The Board will not speculate as to what circumstances would trigger positive alleviating action under ss.(7) by the Board, it merely states that the evidence advanced in this appeal does not demonstrate a situation in which the Board should grant relief under ss.(7).

Thus the Board hereby, pursuant to Section 63(4)(a) of the Planning Act, confirms the decision of Council.

An Order to dismiss this appeal pursuant to Section 29 of the Municipal Board Act will issue accordingly.

DATED at Halifax, Nova Scotia this 9th day of July, A.D., 1986.

RICHARD L. WELDON
Member

Three Star Developments Limited v. County of Halifax

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-1 TO R-4 TO PERMIT APARTMENT BUILDINGS--JURISDICTION--SERVICE ON BOARD AFTER HOURS--CHARTER OF RIGHTS--BOARD MUST APPLY IT--REASONABLY CARRY OUT INTENT OF M.P.S.--CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SS. 15(1), 24(1)--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 63(2),(3),(4),(5)--SACKVILLE M.P.S., POLICIES P-31(a), P-104, P-109

This is an appeal by T.S.D.L. from a decision of the Municipality of the County of Halifax refusing to amend its Land-Use By-law by changing the designation of Lots TS1 and TS2 abutting Highway 1 (Sackville Drive) from R-1 to R-4. T.S.D.L. wished to construct a 22-unit apartment building on one lot and a 9-unit apartment building on the other. There was a preliminary objection to the Board's jurisdiction on the ground of late filing of the Notice of Appeal. The Notice was delivered to the Board by sliding it under the locked door of the Board's office between 5:15 and 5:45 P.M. on Oct. 28, the last day of the appeal period. The Notice of Appeal was date stamped and seen by the Board on Oct. 29. There is a Municipal Planning Strategy (M.P.S.) applying to the subject area. The lots had previously been designated General Commercial but were now designated Urban Residential. Planning staff had recommended approval of the rezoning. In refusing the application, Council relied heavily on the paucity of available school capacity to service the extra school population expected.

HELD: The Board has jurisdiction to hear this appeal on the merits. The appeal is allowed and Council is instructed to amend the By-law so that the subject lots may be zoned R-4.

The filing of the Notice of Appeal as was done here constitutes service upon the Board provided some human agent of the Board obtained access to the Notice. The Notice came into the hands of a responsible agent of the Board the next day and so the Board has jurisdiction. The Appellant also submitted that its constitutional rights under s.15(1) of the Canadian Charter of Rights and Freedoms were violated. The Board is a "court of competent jurisdiction" within the Charter and has jurisdiction to determine these constitutional issues. The Board finds that the questioned sections of the Planning Act are not in contravention of the Charter. Inferior tribunals such as the Board must apply the Charter to the law dealt with before them. On the merits of the appeal, the decision of Council does not reasonably carry out the intent of the M.P.S. If Council wishes to act contrary to the advice of staff, it must be sure it does not proceed in a manner contrary to the intent of the M.P.S. The Board adopts the planning staff's interpretation of the M.P.S. as it applies to the appeal in hand.

NSMB-499-85-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: the Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **THREE STAR DEVELOPMENTS LIMITED,** a body corporate, Applicant and Appellant, from the decision of the Council of the MUNICIPALITY OF THE COUNTY OF HALIFAX, Respondent, made on October 7, 1985, rejecting the Applicant's application to amend the Respondent's Land-Use By-law for Sackville by changing from R-1 to R-4 the zoning of Lots TS1 and TS2 located on Sackville Drive (near Judy Avenue) in the County of Halifax, Province of Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: JAMES G. MacLEAN, LL.B., for the Appellant;

ROBERT G. CRAGG, Q.C., for the Respondent, the Municipality of the County of Halifax;

DAVID MELNICK, LL.B., for five Interested Parties.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board member RICHARD L. WELDON, to hear this planning appeal at the Board's March 5, 1986, sittings at the hearing rooms of the Expropriations Compensation Board, Halifax. This appeal is made by the Applicant on notice directed to the Board and to the Respondent. The notice appeals the October 7, 1985, decision of the Council of the Municipality of the County of Halifax (hereinafter called "The Council") refusing the Applicant's application to amend the Municipality's Land-Use By-law for Sackville by changing the designation of Lots TS1 and TS2 from R-1 to R-4. R-1 is a single family residential designation. R-4 designation allows the construction of multi-unit residential buildings. Both lots are owned by the Applicant, abut the eastern margin of Highway 1 (at this point called "Sackville Drive"), and run northerly from Sackville Drive which, here, serves as a mainstreet of the Halifax County suburban community of Sackville.

Lot TS2 is a four sided lot. Its east and west boundary lines meet its north line at right angles and are parallel to each other. Its "south" line is the "east" side of Sackville Drive. Starting from its north boundary and working clockwise, its dimensions are approximately as follows: 84.65'; 214.35'; 100.14'; 159.75'.

Lot TS1 is considerably larger than lot TS2 and its west line is parallel to the side lines of Lot TS2 and approximately 120' distant easterly along the "east" side of Sackville Drive from the East side of Lot TS2. The land intervening between the two lots is a single lot having an R-1 designation. Lot TS1, a lot considerably larger in area than Lot TS2, has five sides: South-the "east" side of Sackville Drive, approximately 246.30'; west approximately 146.08'; north 107.11'; east approximately 161.36' by the curve of the west line of Judy Avenue; southeast approximately 185.98' running between the west line of Judy Avenue and the "east" side of Sackville Drive.

Lot TS1 slopes upward from Sackville Drive in an abrupt manner. From its lowest point (its south corner) to its highest point (its northeast angle), there is a difference in elevation of almost 35'. Lot TS2 also slopes upward from Sackville Drive. Both lots are currently vacant and have direct highway access to Sackville Drive where both water and sewer services are installed and available.

Preliminary objection (on the grounds of the Appellant's late filing with the Board of the Notice of Appeal) to the Board's jurisdiction to hear the appeal was made by counsel for the Respondent and by counsel for the Interested Parties. The Notice of Appeal was dated "this 28th day of October, A.D., 1985". It was stamped by the Board "Received Oct. 29, 1985 N.S. Municipal Board". This stamping by a responsible employee of the Board indicates that, in the usual course of business of the Board, this Notice of Appeal was first seen by some person responsible to the Board for the handling of such notices on that day. At the written request of the Chairman, counsel for the Appellant filed his own Affidavit, sworn November 5th, 1985, which reads, in part, as follows:

> "2. THAT on the 28th day of October, A.D., 1985, I caused a Notice of Appeal to be delivered to the offices of the Nova Scotia Municipal Board, Suite 510, Bank of Commerce Building, 1809 Barrington Street, Halifax, Nova Scotia, between the hours of 5:15 p.m. and 5:45 p.m. and slid the said envelope containing the Notice of Appeal under the door of the said office at [sic] it was locked."

Opposing counsel accepted this Affidavit as factually correct and the Board concurrs.

The Planning Act, S.N.S. 1983, Chapter 9, Section 63(2) states:

> "An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the publication of the advertisement required under subsection (3) of Section 60, or, in the case of refusal to amend the land-use by-law, within twenty-one days of the date of the decision of the council".

October 28, 1985, was, accordingly, the last day to serve the Notice of Appeal on the Board to perfect this appeal. This preceding statement raises two related questions:

1. What constitutes service on the Board in the context of the Planning Act?
2. If what was done by the Appellant here was proper service on the Board, was that service done within time?

In his arguments, written and oral, Mr. Melnick, counsel for the Interested Parties, makes several points concerning service. He submits that the Planning Act only permits three types of service namely personal service, or service by ordinary mail, or service by registered mail. He says that what the Appellant had done was clearly not service by registered mail, was not service by ordinary mail, and failed to be timely personal service because it came into no responsible human hand at the Board until a day too late. Mr. Cragg, on behalf of the Municipality, gave the Board the benefit of his thinking on the issue of service of the Notice of Appeal, but his submission, quite appropriate for the deciding municipality (which has in this appeal a position much like that of an executor in estate litigation i.e. the position of a stakesholder), is succinct: "the Municipality takes no position on this issue."

Mr. MacLean, counsel for the Appellant, says that the Board is not a person, that personal service is, therefore, not possible, and all that is required is delivery of the Notice of Appeal to the offices of the Board within the statutorily defined time. Contrary to Mr. Melnick's submissions, Mr. MacLean suggests the Board's offices need not be open at the time of delivery.

The Planning Act deals with the issue of service of notice of appeal in the following sections:

> "63(2) (supra)" and
>
> "106(1) Any decision or other document required to be served under this Act may be served personally, by ordinary mail or by registered mail."

Mr. MacLean rather inelegantly referred to the Board as "this inanimate Board" and asks how one serves it. Without trying to characterize the Board, the Board finds itself to be peopled with animate members, a Clerk, and other human support staff receiving its powers under the Municipal Board Act. His point, the Board assumes, is that the Board is not a natural person and is not a partnership or a body corporate in any conventional sense of the word and thus service on the Board is not defined more fully in some statute not already mentioned of general application. If that is his submission, it is probably correct.

Service on the Board of a Notice of Appeal is a sine qua non for the Board to take jurisdiction in a planning appeal. Mr. Melnick's argument makes a point that service is fully defined by Section 106 of the Planning Act. That section, however, is permissive in that it uses the word "may" and thus leaves the Board free to consider the various modes of service therein contained plus any other modes of service that might, in fact, exist elsewhere in the law of this province. Mr. MacLean cites the appeal of D. Agatha Rogers /1/ (referred to in Glow-Worm v. Atlantic Shopping Centres Ltd. [et al], 1981 46 N.S.R.(2d) 223 /2/ at page 238) which, in effect, allows service "by telephone" to the Chairman of the then Provincial Planning Appeal Board (PPAB), a direct predecessor of the present Board. The PPAB's decision in the appeal Rogers is found in Volume 8, PA Decisions at page 1035 /1/. At page 1038 of that decision the Board, in assuming jurisdiction, states:

> "The Board...assumes that the Notice of Appeal had been received by the Board on September 30, 1977, being the same date that the Director...had... received his copy of the...Notice...which had been mailed to him on September 29, 1977 from Middleton, being the same date that the Notice...to the Board, had been mailed."

The PPAB then found that September 30th was the last day for filing the appeal. The PPAB made no finding in Rogers /1/ that any person at the PPAB had seen the Notice on that day: the PPAB was silent on that matter. Hence, in Rogers /1/, at least, actual knowledge of the contents of the notice of appeal by some human in the employ of the PPAB was not a prerequisite for effective service of the notice. Telephone advice to the Chairman that a notice would be mailed followed by the promised mailing, followed by the probable timely arrival of the notice was sufficient in the mind of the PPAB to support its jurisdiction to hear the appeal on its merits. On a certiorari (Glow-Worm) /2/ application commenting on the practice of the PPAB, Burchell J. at p. 238 of Glow-Worm /2/ is less than supportive of the PPAB's decision in Rogers /1/ when he says:

> ". ..it is to be noted that the Board in a later jurisdictional hearing was at pains to validate the notice on other grounds, even resorting to an 'assumption' that the notice in question was actually received on the following day..."

and he rationalized the service accepted in Rogers /1/ by the PPAB as equating actual personal service on the Clerk of the Municipality to service on the Board "in effect delegating the Clerk...as the Board's agent." Rogers' /1/ text contains no such delegation. The Planning Act as it then existed had in the statute itself no provision spelling out any "service".

That statute allowed an appeal to be commenced by a notice of appeal in writing. It did not state on whom this notice of appeal ws to be given, if to anyone, but since the appeal had to be commenced within a certain time, logic demanded that the notice of appeal be given to someone. The regulations made under that statute seem somewhat incomplete as the only mention of service of notice of appeal therein reads as follows:

> "5. Service of a notice of appeal may be proved by Affidavit."

This rule does not say who, if anyone, must be served but it implies that someone or something must be proven to have been served. In Glow-Worm /2/, MacKeigan C.J.N.S. laid down the service required under the then existing Planning Act in these words, at p. 225:

> "The section clearly requires that a notice of appeal be given to the Board, that is, be actually communicated to the Board in some way, within thirty days. This was not done."

In the Trial Division decision of the same case, Burchell J. did not have Rogers /1/ before him in review and he may have put too much emphasis on the PPAB's admittedly inaccurate use of the word "assume" when he was interpreting Rogers /1/ for the purposes of his decision in Glow-Worm /2/. The PPAB in Rogers /1/ had adequate evidence before it to find that, since the Director had received his notice of appeal on September 30th, since that notice of appeal had been mailed from the same town to the same city on the same day as the same notice to the PPAB, then the PPAB had probably received its notice of appeal on September 30th, also. In Rogers /1/ the PPAB had the unreviewable duty to make findings of fact and, in the matter of ascertaining the date of delivery to it of the notice of appeal, it made such a finding (albeit it used the word "assume"). Burchell J.'s critical interpretation of the PPAB's finding of a particular fact in Rogers /1/ appears to this Board to be a comment on the PPAB's improper use of the word "assume" when it should have (and in the full context of its remarks did say) said "finds". In any event, Rogers /1/ was not appealed and still stands as it was written. Burchell J.'s general comment on Rogers /1/ "...it is fair comment to say that what was arranged between the solicitor and the Chairman was yet another mode of substituted service." is adopted by the Board as further authority for its previous opinion that there may be other modes of acceptable service of notices than those listed in Section 106 of the Planning Act. Glow-Worm /3/ at its hearing level before the PPAB, at its hearing level before the Trial Division, and at its final disposition in the Appeal Division uniformly held that, in that case, proper service of the notice of appeal had not been effected in time to endow the PPAB with jurisdiction to hear the original planning appeal on its merits. Subsequent to Glow-Worm /2/, the Legislature made changes to the then existing Planning Act which address various of the lacunae in the older Planning Act which were exposed in the decisions in Glow-Worm /2/. The general trend of these legislative changes was to allow, inter alia, easier methods (or more precisely defined and, hence easier, methods) of service of notices of appeal in Nova Scotia planning appeals.

The Board is thus of the opinion that since Glow-Worm /2/ found, in effect, no service, since by subsequent legislation its effect was modified in favour of more liberal modes of service of notices of appeal, any comment in Glow-Worm /2/concerning an appellant-favouring interpretation of the Planning Act's service requirements have even more validity now than they did at the time the decisions were written. Because of the change of legislation since Glow-Worm /2/, MacKeigan C.J.N.S.'s use of the word "given" is no longer appropriate when used in connection with a planning appeal, since the Planning Act Section 63(2) requires a filed appeal be served on the Board. The present practice of the Board is to treat the service and the filing to be acts in which the Board is a participant and which are taken to occur simultaneously and the Board, to date, has never taken the view that the notice of appeal be filed and then served. Such an interpretation could flow from a literal reading of Section 63(2) of the Planning Act. The effects of such interpretation could be easily sustainable in the metropolitan Halifax area where the permanent offices of the Board are currently located, but the "service by mail" provisions of the Planning Act, primarily designed to serve the needs of citizens outside of Metro, would be largely negated by such a literal interpretation. Accordingly the Board does not hold the opinion that it must be served with a previously "filed" notice of appeal and it does hold the opinion that its present practice is in accord with the Planning Act.

Burchell J. at page 237 of Glow-Worm /2/ quotes, with approval, The Construction of Statutes by E.A. Driedger:

> "Where the constructions are open the Courts must make a choice, and in making that choice, such factors as absurdity, injustice, hardship and inconvenience are relevant, and, generally speaking, ...the courts will adopt a construction that will avoid such consequences."

The PPAB in its consideration of Glow-Worm /3/ found in Volume 10 of Planning Appeal Decisions p. 1427 at p. 1431 states:

> "It has been the policy of this Board to liberally interpret its founding legislation

> to allow the widest possible scope in assuring that as many cases as possible be decided on their respective merits."

The Board now finds that the Appellant filed his notice of appeal herein with the Board by sticking it under the locked office door of the Board's offices before midnight (but after conventional office hours) of the last day appropriate for service of such notice of appeal. In accordance with the Board's authorized practice, such filing constitutes service upon the Board provided (since there is no deeming section) some human agent of the Board, quam celerimme, obtained access to the notice of appeal. There is a clear risk that a notice of appeal served as this one was might never arrive in the hands of a responsible agent of the Board and the statute implies that (with the exception of deemed mailing) the Board must have an actual notice available to it to process.

In this appeal, the notice of appeal came into the hands of a responsible agent of the Board on the next available day. Notice of appeal had been filed and service on the Board had been made the previous day and was, therefore, within time and thus the two questions as to service posed earlier in this decision are answered as follows:

Q. 1. What constitutes service on the Board in the context of the Planning Act?

A. 1. In the personal service aspect (as opposed to the deemed mailing aspect) of the Planning Act provisions for service on the Board, some actual placement of the notice of appeal readily available to the hands of a responsible agent of the

Board is required within the statutory time limit.

Q. 2. If what was done by the Appellant here was proper service on the Board, was that service done within time?

A. 2. The filing which was done amounted, in the circumstances of this appeal, to service and was done before the expiry of the last day provided by the statute for the initiation of appeals. For the reasons set out above, the Board holds the opinion that filing with the Board and service on the Board (in appropriate circumstances) occur simultaneously and, in this appeal, were accomplished simultaneously. Thus service of the notice of appeal on the Board in this appeal was accomplished within the prescribed time.

Another point, a point of practice, should also be dealt with conveniently at this part of the decision. In this appeal, as in most planning appeals, the Board (acting through its Chairman) under rule 8(1) of Rules of Practice and Procedure Respecting Appeals Under the Planning Act (hereinafter called the Rules) ordered the Appellant, by letter dated February 6, 1986, "[to serve]...by ordinary prepaid mail...[the approved notice of hearing] ...on the following persons: ...5. All the assessed owners of land within a distance of 500 feet to the subject site.

At the hearing of the appeal, the Board will expect to be provided with an affidavit in proof of service of the Notice of Hearing on the persons mentioned in this letter." At the appeal hearing, counsel for the Appellant tendered his Affidavit, sworn March 4th, 1986, which states in part:

> "2. THAT in accordance with the instructions of the ...Board ... I have caused [sic] copies of the attached Notice of Hearing ... to be deposited at the Lower Sackville, Nova Scotia, Post Office ... by ordinary post, postage prepaid, addressed to the following persons: ... and to all the assessed owners within a distance of 500 feet of the subject site."

At the hearing, the Board stated this Affidavit did not prove, in a manner satisfactory to the Board, that the Board's instructions had been carried out. The Board stated that the Appellant should prove, in addition to those things already proven by Affidavit, the method used to determine "all the assessed owners of land within ... 500 feet of the subject site." and a list of their names and addresses [if the option of service by mail was used]. Counsel for the Appellant explained verbally to the Board the methods he had used to effect service of the notice of hearing on the nearby assessed owners. This explanation showed that he had properly followed the Board's instructions on this point so he was permitted to file a supplementary affidavit of service, embodying his explanation, which he did on March 13, 1986. The Board was thus able to determine that the notice of hearing herein was served on the persons required by the Rules.

At the hearing, counsel for the Appellant called as his witnesses John Gardin and Joan MacKinnon. Counsel for the Municipality called no witnesses. Mr. Melnick called an Interested Party, Cecil Percy. The evidentiary portion of the hearing concluded before 4:30 p.m. on the date set for the hearing, March 5th, 1986. The Board expressed a desire to view the site, preferrably without counsel or parties.

Mr. Cragg did not wish to attend any view. Both Mr. MacLean and Mr. Melnick insisted on attending any view taken. In accord with their right to be present at any such view taken by the Board, the Board, Mr. MacLean, Mr. Melnick and the Clerk of the Board took a view on April 7, 1986.

At the inception of the hearing, Mr. Melnick said he was appearing for Cecil Percy, Wayne Noonan, Tom Rafter, Marcallittini Dino, Jim Dominey, Interested Parties (which status the Board determined each filled).

Mr. MacLean called as his first witness John Gardin who stated he was one of the principal owners of the Appellant and its vice-president. He said the Appellant is a body corporate incorporated in 1972. It is involved in general contracting, development, and has constructed over 130 housing units since its incorporation. Other principals of the company at this time are Alex Gardin, the witness' brother, and one James Gardin, also a family member. As well as residential developments, the Appellant has built some small commercial developments. The subject properties were acquired by the Appellant as part of a larger block of land in 1972 and have been held by it since that time in an undeveloped state. Out of the same block of land, the Appellant, over the years, had developed the Maplegrove Subdivision. The witness named prominent streets in that subdivision namely: Judy Avenue and Deneb Crescent.

The witness stated that the Appellant, if and when it attained the desired land use designation (R-4), would build one residential apartment building containing 22 apartments on Lot TS1 and another such building of 9 apartments on Lot TS2. He said these buildings would have design characteristics to make the buildings fit into the surrounding neighbourhood.

Mr. Gardin expressed the view that the slope of Lot TS1 made that lot's bordering on Judy Avenue useless for development purposes. The units proposed for Lot TS2 were "singles' apartments" and those for Lot TS1 were to be two bedroom "family units."

He deposed that future ownership and management of both proposed buildings would remain with the Appellant. Mr. Gardin said that the proposed buildings would "be kept in order" because it was in the financial interests of the Appellant so to do. This witness regarded the subject development as a good way to put away "a few dollars for the future".

He stated that this development would take full advantage of the slope of the lots as a buffer between the proposed development and the adjacent R-1 development of Maplegrove subdivision. The buffering would be enhanced by the preservation of the existing healthy tree growth on the northeastern portions of the lots, and the planting of trees and shrubs (to augment buffering where natural growth is deficient). Mr. Gardin said that the proposed green areas would also create a nice environment for the people who would be living in the proposed buildings.

Mr. Gardin feels a rejection of the Appellants' application will cause great economic hardship to the Appellant since the land relates most closely with Sackville Drive (which is a strip development of mixed commercial with some older residential uses) and the expense of presently allowable R-1 development will prevent the developer from obtaining an appropriate economic return from any such development.

On cross-examination, Mr. Gardin noted that the Municipal Planning Strategy of the Municipality of the County of Halifax for Sackville (hereinafter called the M.P.S.) was changed early in 1985 to permit the possibility of development such as that proposed by the Appellant.

Prior to this change in the M.P.S., the subject lands were designated "General Commercial" and the proposed development was not an allowed use under that C-2 designation. Mr. Gardin attended, as the Appellant's public spokesman, a public information meeting with the area residents prior to the public hearing held by Council on the (rejected) rezoning application. None of the residents at either meeting spoke in favour of the rezoning. Many of the residents opposing the Appellant's development had purchased lots in Maplegrove subdivision.

Mr. Gardin said that, in the course of promoting the subject development, he had frequent recourse to staff at the Municipality's planning office. He said staff was helpful in answering questions when asked but volunteered no advice. He said he dealt with no staff member in particular, he consulted whoever was available at the time he inquired. He said that a planning staff member spoke in favour of the subject development at the public hearing before the Council. Former councillor Frank Sutherland, present councillor Bill

Macdonald, and local M.L.A. John Holm all spoke at the same meeting against the proposed development.

Mr. Gardin admitted the Appellant had full opportunity to present its views at the public meeting.

Under Mr. Melnick's cross-examination, Mr. Gardin described a sewer easement (about 15' wide) running southwesterly from Judy Avenue to Sackville Drive along the southeasterly boundary of Lot TS1. In the present undeveloped state of Lot TS1, the school children from Maplegrove subdivision use this portion of Lot TS1 as a walkway from Judy Avenue to Sackville Drive on their way to their elementary school and to the junior high school, both of which lie to the west from Sackville Drive. In the view of this witness, these school children are trespassers when they are using this easement in such a manner.

This witness said there were adequate municipal sewer services to handle this development. School age children residing in the buildings proposed for this site would attend school in the Sackville school system. Mr. Gardin said that municipal authorities had never requested walkway access for the school children across Lot TS1 to and from Judy Avenue and Sackville Drive. He said that the local M.L.A. advocated a moratorium on development in the area until new schools were built. Mr. Gardin "could not understand what he was talking about."

Joan MacKinnon, a planner with the Municipality of the County of Halifax, testified next. She has a master's degree in urban planning from McGill University (1978), has worked as a planner for five years (three years with her present employer), the first two years with the Municipality of the County of Richmond. In those positions, she mostly did community planning. At the request of the Appellant, this witness was qualified as an expert in urban planning entitled to give opinion evidence before the Board concerning urban planning in the metropolitan area of the Municipality of the County of Halifax (having special regard to Sackville).

Ms. MacKinnon said she was the author of the staff report that is contained in the Municipality's exhibit (Exhibit T-5). She described the internal process used by the planning staff in dealing with this "rezoning request". Planning staff, in evaluating the Appellant's request, would first read the M.P.S. in conjunction with the request and "see how that application relates to what the plan has to say".

This study allowed her to determine that the Appellant's application could be considered for the Sackville area. The area is presently designated "Urban Residential" and under that designation Council may consider use of land for residential apartment buildings. Thus Council may consider this "rezoning" from R-1 to R-4.

The land in question formerly had a "General Commercial" zoning and that had recently been rezoned by Council to its present R-1 zoning by an amendment to the Land-use By-law. This witness stated her opinion that under the previous designation the present application could not have been meaningfully entertained by Council.

She supports the statement in the staff report as factually correct when it says: "General development in the area is of a mixed use nature". Her opinion carefully links the subject lots with the ribbon of development along Sackville Drive and not with the back lots of Maplegrove subdivision fronting on the avenues Judy and Deneb.

In making its report, staff considered the adequacy of sewer and water services for this development. Ms. MacKinnon noted that the report said that capacities for the collector and the trunk sewers were adequate in the short run, but the construction of multiple family dwellings would use up those capacities quicker than no construction at all, and quicker than the construction of single family buildings. In order to identify and to preserve the proper population density so as not to overload the design capacity of the sewers, Ms. MacKinnon had to calculate the population density anticipated to result in the "Judy Avenue area" from this proposed redesignation. She says her calculation showed a density of nine persons per acre, a density well within the maximum estimated desireable density of eighteen persons per acre.

Ms. MacKinnon said transportation services were appropriate to support this development. Access to Sackville Drive was available. Public transit served the subject lands on that same street. Pedestrian safety was served by sidewalks on, and crosswalks over, Sackville Drive.

In her opinion, Ms. MacKinnon felt the nearby single family houses were adequately buffered from this proposed multi-family use by the topography of the lots, the tree cover on the lots, and the stated desire of the developer to accommodate his construction to the area.

Schools in the area (or the present lack of same) were of concern to the witness in her consideration of the Appellant's application. While acknowledging the acute shortage of classrooms in Sackville, she noted this problem related to all residential development and not just to apartment buildings. The Municipality's Planning Advisory Committee (P.A.C.) had considered this school problem and, according to this witness, had decided that the problem, as it related to land development, should not be decided on an individual project basis but could only be fairly dealt with by an overall policy affecting all land development in Sackville. At the time of the presentation to Council of the subject application, no such overall policy had been adopted.

Ms. MacKinnon said controls on development of the site as to building height, lot coverage, open space, and the like would be provided for in the zoning applied for by the Applicant.

In summing up her direct testimony, Ms. MacKinnon expressed the following opinion: "In my opinion, in terms of the criteria outlined in the Municipal Development Plan, it [the subject application] adequately meets those criteria and I found, in writing the report, more support [in the M.P.S.] for recommending approval of the rezoning than for the rejection."

She agreed, in considerable detail, with Mr. Gardin's description of the subject property.

Mr. Cragg commenced Ms. MacKinnon's cross-examination. She stated that contrary to staff recommendations and contrary to the P.A.C.'s views the widsom of on a general policy concerning schools in relation to residential development in Sackville, still approached the school problem on a piecemeal project-by-project basis rather than considering it in the light of an overall residential development policy for Sackville. Council, she felt, had no proper power to ignore the school problem and to grant approval of one residential development for Sackville, while in another similar residential development, use that same school problem as a determinant in a decision to reject that similar development.

Ms. MacKinnon said that public participation was necessary for a plan amendment ---a public hearing was all that was required for a "rezoning" amendment.

She said that the M.P.S. recognized a need for multi-unit residential development. Ms. MacKinnon said she recommended "those [subject] sites for this use." She did not, however, weigh the public opinion factor as against the planning considerations in arriving at her opinion. She felt such a consideration was the function of Council.

Ms. MacKinnon officially visited the site twice in the course of her duties in preparing her recommendations. She casually passes the site every two weeks so she feels she is very familiar with the site. She conceded that rezoning provided no protection for the tree cover on the subject lots nor did it ensure that the vegetation so graphically illustrated on various exhibits produced before the Board would, in fact, be put in place and properly maintained by the developer.

In her opinion as a planner, Ms. MacKinnon stated: "Those two lots are [each] suitable for an apartment building." She did not believe the subject lots were suitable site for as-of-right single family unit construction and occupation because they were located on a busy collector street and were surrounded by busy commercial uses.

At the time of writing the staff report, according to this witness, Council could not enter a contract development to govern the proper development of the subject lands because of the M.P.S. She further stated there was a long term municipal goal, to be achieved by engineering means, to reduce ground water infiltration into the sewer system and thus to increase the waste carrying capacity of the sewers nearer to their design optimum.

Ms. MacKinnon said the vacancy rate of residential apartments in Sackville was very low and that fact led her to conclude that there was, and is, a high economic demand for the construction of more multi-unit residential units in Sackville and the M.P.S. responds accurately to that demand.

Even under the post-application changes in the M.P.S. (permitting contract development in Sackville for multi-unit residential construction) rezoning to an increased residential density is still an appropriate method of development control when the subject site has access to a collector highway such as Sackville Drive.

Mr. Cragg declined to call any witnesses. Mr. Melnick called Cecil Percy, one of the Interested Parties. Mr. Percy resides in his single family home located at 32 Judy Avenue adjacent to Lot TS1 at its north eastern corner. He identified the petition contained in Exhibit T-5, tab 13 containing over 200 names as a true copy of the petition in opposition to the Appellant's application for rezoning of the subject lands. He said he had spoken to the vast majority of the signatories of the petition. He, his wife and some of his neighbours obtained the totality of the signatures of the petition.

Mr. Percy said there were two schools in the area, Sackville Heights Junior High and Sackville Heights Elementary, located on the far side of Sackville Drive from his home. Both schools are severely overcrowded. In addition to the permanent school buildings, there are already five portable classrooms at the elementary school and two at the junior high. He said he and his neighbours strongly oppose adding any more students to these already overcrowded schools. He said the existing crosswalks were inadequate to meet the existing student pedestrian traffic and would be further overburdened by the extra student population likely to emmanate from the proposed development. He said one of the existing crosswalks would be in conflict with the proposed driveway of Lot TS1. Cecil Percy confirmed that school children use the area of the sewer easement on Lot TS1 as an unofficial walkway to get to school.

Mr. Percy felt apartments built on Lot TS1 would attract unwarranted extra vehicular parking on the western side of Judy Avenue at its congruence with Lot TS1. Because of the grades and curve of Judy Avenue, such parking would constitute a traffic hazard to persons and vehicles using Judy Avenue.

Mr. Percy believes his present quiet neighbourhood will be disrupted by the noise created by the future inhabitants of the proposed apartments. These apartments have no play area of their own. He feels the construction process will destroy most of the trees on the lots and thus the buffering effect of the trees will be lost. He believes, based on his experience with other apartment buildings, that the grounds will become littered with garbage. All these factors, and more, will, says this witness, cause all property values in the neighbourhood to decline (his included).

Had he known his house would be located next to an apartment house, Mr. Percy says he would not have purchased it. He is subject to transfer in his line of work, and he must contemplate the resale value of any house he buys. He has already purchased four homes in his career.

Mr. Percy said approximately 30 people, residents of the area, accompanied him when he attended Council to make representations against the subject application. At the Council public hearing all who wished to speak had their say. Mr. Percy had also attended a public meeting in Sackville where the developer and the local citizens tried to work out a compromise. They failed. On cross-examination, Mr. Percy disclaimed any animosity towards apartment dwellers. His experience as a contractor repairing and repainting apartment buildings, and as a youth abusing them, leads him to believe that apartments are often a source of disruption in the community in which they are built.

Mr. Percy said Councillor Bill Macdonald suggested that the production of a pedestrian walkway over Lot TS1 "was best left until after this was settled." This was contrary to Mr. Percy's wishes since he felt the pedestrian access problem was already acute and should be resolved regardless of the result of the rezoning dispute.

After this conclusion of the evidence, counsel and Board canvassed the issues the Board had to consider and counsel agreed to file and exchange written memoranda. The last of these was filed with the Board on April 1, 1986.

Counsel for the Appellant raised the Canadian Charter of Rights and Freedoms (hereinafter called the "Charter"), and said the Board is a "court of competent jurisdiction" as defined in Section 24(1) of the Charter and thus must apply the Charter in appropriate circumstances. He then argues that Section 63(5) of the Planning Act violates the Appellant's rights of equality before the law as stated in Section 15(1) of the Charter in that the alleged offending section makes the Appellant less than equal before the law than the Respondent and, as well, changes the criteria governing rezoning approval between the time of the Council hearing and the time of the Board hearing.

Mr. Melnick, contra, says that the Board, because of its status as an inferior tribunal, has no jurisdiction to determine whether any violations of the Charter occurred and, even if it has such jurisdiction, no violations have occurred, and furthermore, even if it has jurisdiction, the only possible Charter Section that could have been violated would have been Section 15 which applies only to individuals and the present Appellant is not an individual within the meaning of that Section.

Said Section 15 came into force in this province on April 17th, 1985, so it preceded all the planning transactions that are now being considered by the Board in this appeal. Therefore the Board cannot avoid the Charter issue by reading the calendar and excluding the effect of the Charter based on the results of such reading.

For the reasons set out in Appendix A to this decision, the Board holds that it has jurisdiction to determine the constitutional issues raised herein by counsel. It finds that the questioned sections of the Planning Act are not in contravention of any section of the Charter and therefore they apply, unchanged, to the facts of this appeal.

The Board is now free to perform, unfettered by any further consideration of the constitutional rights of the Appellant, its duty to apply the standards of section 63(3) of the Planning Act, as and if modified by section 63(5) of the same act, to the facts and other law governing this appeal.

The M.P.S. for Sackville (Exhibit T-6) at page 30 has this to say about the Urban Residential Designation in which the subject lands fall:

> "The Urban Residential Designation is designed to recognize the importance of the single unit environment with its associated home business occupations, and yet acknowledge the need for higher density residential and local commercial development. The demand for multiple unit dwellings will continue to increase in response to the diversified housing needs of the general population. In certain areas of the designation, particularly on lands which have access to collector roads, zoning standards can be developed which introduce such uses without significantly impacting on most existing land uses."

This general statement of intent is spelled out more specifically at page 32 of the M.P.S. in Policy P-31(a) which states:

> "Notwithstanding Policy P-30, within the Urban Residential Designation, multiple unit dwellings may be considered on lands having frontage on or access to collector roads as identified on Map 3 (Transportation) by amendment to the zoning by-law. In considering such amendments, Council shall have regard to the provisions of Policy P-104 and the adequacy of separation distances from low density residential developments."

Policy P-104 states, in part:

> "In considering amendments to the zoning by-law... in addition to all other criteria as set out in various policies of this plan, Council shall have appropriate regard to the following matters:
>
> (i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;
>
> (ii) that the proposal is not premature or inappropriate by reason of:
>
> a) the financial capability of the Municipality to absorb any costs relating to the development;

> b) the adequacy of sewer and water services;
>
> c) the adequacy or proximity of school, recreation and other community facilities;
>
> d) the adequacy of road networks leading or adjacent to, within the development; and
> ...
>
> (iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
>
> a) type of use;
>
> b) height, bulk and lot coverage of any proposed building;
>
> c) traffic generation, access to and egress from the site, and parking;
> ...
>
> f) any other relevant matter of planning concern."

At page 76 of the M.P.S., Policy P-109 bears on the instant appeal. It states, in part:

> "P-109 It shall be the intention of Council to provide further controls over development within the Plan Area by fully enforcing the following by-laws, and by reviewing their adequacy and making amendments where appropriate:
>
> (i) the Building By-law;
>
> (ii) the Unsightly Premises By-law;
>
> (iii) the Topsoil By-law;
>
> (iv) The Excavation By-law;
>
> ...
>
> (vii) the Sewer Connection By-law;
>
> (viii) the Occupancy Permit By-law."

Exhibit T-7 entitled "M.D.P. Municipality of the County of Halifax Zoning By-law for Sackville 1982", hereinafter referred to as the "Land-Use By-law", has controls which apply to the R-4 land use proposed by the Appellant herein. Regard must be had to part 9.1 of the Land-Use By-law, page 36, for the uses permitted in the proposed "zone". Part 9.2 lists the "zone" requirements which will govern the issuance of any development permit for any multiple-unit dwelling construction proposed for the subject site should it be zoned R-4. Part 9.3 is also a control over the type of construction here proposed.

In its decision to refuse the application to amend the Land-Use By-law, Council relied heavily on the paucity of available school capacity to service the extra school population expected to come into the area when the proposed apartments were built. Staff conceded there was a shortage of available schools but that Council was rezoning on an ad-hoc basis and was, in the face of the same endemic shortage of schools, granting some rezonings and not others with no apparent real differences between the successful applications and the unsuccessful applications. Council was urged to use the refusal of this rezoning as a forum to promote its case for new schools for Sackville, by all means including the generation of unfavourable public opinion, upon what was characterized by some present as an hostile and unfeeling provincial government which had reneged on previous public committments to build the schools in question. The Board can have, and has, no position on the accuracy or inaccuracy of this stated position except to recognize that this position was publicly stated before Council and Council subsequently refused the instant application. Staff was prepared to recommend a total moratorium on development in Sackville, in general, and on rezoning, in particular, to forward Council's apparent political goal (which neither staff nor this Board is in any position to comment upon or agree with or disagree with) of attempting to persuade the higher level of government to build some more schools in Sackville.

The Board notes the statement attributed to the councillor for the district concerned when the walkway problem over Lot TS1 was brought to his attention. That problem may be summarized as follows: The large elementary and junior high school student population inhabiting the interior of Maplegrove Subdivision commutes to school by coming along Judy Avenue, crossing Lot TS1 on the route of the sewer easement thereon, and emerging on Sackville Drive and returning from school by the same route in reverse. There is no proper or official recognition of this real need of the school children, a need which exists now when Lot TS1 is unused, but which could cause great aggravation and inconvenience in the community were the lot to become built up, either (as is now proposed) with a multiple unit residential building, or with as-of-right single family units: both types of development would collide head on with the presently tolerated trespassing by school children. If the use stays as present, the landowner, to protect his property rights would likely move to cut off these children using the easement. There is, in short, a municipal problem here calling for a municipal solution regardless of the present or prospective zoning of Lot TS1. Living right next door to this problem, Mr. Percy communicated to his councillor his concern with the problem and his feeling the problem was current and should be promptly addressed. His councillor advised Percy to wait until "this matter was over".

As pointed out by Mr. Cragg, and admitted by Ms. MacKinnon, Council is not bound by the advice of their planning staff. The Board holds the opinion, however, that if Council wishes, in a given planning matter, to disregard and to act contrary to appropriate staff advice, it must be sure it does not, in so acting, proceed in a manner contrary to the intent of the M.P.S. The Board finds that in the application here the decision of Council was not in accord with the intent of the M.P.S., is contrary to Ms. MacKinnon's interpretation of the M.P.S. (which the Board adopts as the proper interpretation of the M.P.S. as it applies to the appeal in hand), and thus the decision of Council does not reasonably carry out the intent of the M.P.S. The Board makes special reference to the Policies and to the statements contained in the M.P.S. quoted supra in this decision and finds that the proposal of the Appellant fits well within the intent of the M.P.S.

The Board, therefore, will, pursuant to Section 63(4)(c) of the Planning Act, interfere with the decision of Council, allow the Appellant's appeal, and instruct the Council to amend the Land-Use By-law in the manner requested by the Appellant in its application to Council so that the Lots TS1 and TS2 may be zoned R-4.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of July, A.D., 1986.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD

APPENDIX "A"

INTRODUCTION

Our Charter is an evolutionary, written, constitution rather than a constitution written in the wake of a successful armed revolution. It strives to perserve and to improve: most new constitutions attempt to destroy, and only then, to replace.

The general effect of the Chater is to prevade almost all fields of civil life to the extent necessary to provide that the rights included in the Charter are ensured to people in Canada. R v. M 70 C.C.C. (2d.) 123 /4/, a decision of Bean Provincial Court Judge, at page 125 says:

> "...it is clear...that the rights... of citizens of Canada in general have been vastly changed and enlarged since the Constitution Act 1982 was enacted".

See also Singh v. Minister of Employment & Immigration 12 Administrative Law Reports, 137 /6/ at page 193:

> "...the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the supreme law of our nation."

Thus a policeman going about his duties in some dark alley of Halifax City, half asleep, at three o'clock in the morning, can be required, when dealing with the human denizen he may find there, to make value judgments, in a very rapid manner and under the most trying of circumstances, concerning (not only his own life and safety but) the Charter rights, if any, of that denizen.

BOARD'S DUTY TO APPLY CHARTER TO ITS "PROCESS"

Like the poor Halifax policeman mentioned above, the Board is required to conduct its own actions in such a manner that no action or lack of action by the Board will deprive any party before it of the Charter rights, if any, of that party while that party is within the ambit of the Board's sphere of influence. This sphere of influence commences when a potential party files an appeal or makes an application to the Board. All Board actions taken from that time forward until the delivery of the decision and order (or other prior legal termination of the proceedings before the Board) must be done in such a manner so as to give full effect to all Charter rights, if any, of the parties, if any, "before" the Board in that time frame. Re Bird and Peebles and The Queen 12 C.C.C. (3rd) 523 /7/ at page 529 quoting Professor Hogg:

> "The constitutional issue may arise in a variety of legal proceedings, ... collaterally ... in any ... civil proceeding

> before ... any tribunal in a case where legislation is relied on by one side and is claimed to be inapplicable or invalid on constitutional grounds by the other side."

The Board holds the opinion that it has no mandate to go before that time to review the actions others may have taken concerning any alleged violation, prior to the Board becoming involved with the same subject matter, of the civil rights of the parties who may currently be before the Board.

Following the same line of reasoning, the Board is of the opinion that it has no mandate to, in any manner, deal with the Charter rights of parties once the Board is finished with their current proceedings. Thus the Board cannot deal with civil rights violations perpetrated on parties before it by, for example, a municipal council prior to the Board's involvement in the current subject matter anymore than it can interfere with an appeal court's violation of the civil rights of the same party somewhere in the post-order phase of the on-going hypothetical proceedings concerning the same subject matter.

The net effect of these two opinions of the Board has little practical effect on any proceedings before the Board since the Board has always proceeded with a high regard to the rights of the parties before it, whether emanating from the Charter, or from the English Common Law tradition from whence the Charter sprang. Natural justice, fair hearing, and, now, due process are no strangers to proceedings had before the Board. In the sense set out in this paragraph, the Board, like the "Halifax policeman", has to apply in all its proceedings the effect, if any, the Charter rights, if any, of the parties before it, has on its decisions. The Charter is pervasive throughout all our legal system including, without limiting the generality of the foregoing, the Board and the system of law under which it operates.

The alleged civil rights violations complained of in the instant appeal have nothing really to do with the procedural actions of the Board, itself, during the time frame of the Board's jurisdiction over this present appeal.

STATUTORY UNDERPINNING OF BOARD'S POWERS

Section 32 of the Municipal Board Act reads as follows:

> "32(1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board as to all matters within its jurisdiction under this Act has authority to hear and determine all questions of law or of fact."

The Board is of the opinion that the advent of the Charter has not altered the effect of Section 32 of the Municipal Board Act (this opinion in itself is an interpretation of the Charter) and thus the Board has still the full responsibility of correctly determining its own jurisdiction, what facts to find within that jurisdiction, and what law to apply to the facts so found when exercising its jurisdiction. (For the purposes of the reasoning in this part of this decision only, no consideration will be given to the means available for the correction of any legal error made by the Board.) In R. v. Big M Drug Mart Ltd. (1985) 3 W.W.R. 481 /8/ Dickson J. (as he then was) cites Professor Hogg at page 500 as authority for the following proposition "In contrast is the view that the competent court is that which has jurisdiction over the subject matter being litigated." The learned Justice (perhaps "pindancing" in the expression used by Locke J. in Shewchuk v. Attorney General of British Columbia [1985] 6 W.W.R. 436 /9/ at page 446) then cautiously refrained from either endorsing or rejecting this proposition. Dickson J. founded his result in these words:

> "The Provincial Judge was not called upon to make either prerogative declaration or a s.24(1) order. He simply was asked to prevent a violation of the fundamental principle of constitutional law embodied in s. 52(1) by dismissing the charges."

In the above citation of Shewchuk /9/ Locke J. says:

> "While it is true the Provincial Court has no inherent jurisdiction it is here obviously competent. I know of no way a judge could "declare" legislation of no force and effect without saying so, or alternatively using words such as "I find" the legislation to be of no force and effect, which seems to be nothing but verbal pin-dancing. The same would seem to apply to one who applies for proper remedy under s. 24(1). Either case can result in a "declaration" that the legislation is invalid and of no effect."

This section of Locke J's decision cannot be faulted in its logic and ought to prevail.

CHARTER & CONSTITUTIONAL QUESTIONS ACT

Since the Charter is a constitutional document, (Re Gittins and The Queen 137 3 D.L.R. (3rd) 687 /10/ at page 694 "The Charter is a constitutional document ,...") and is here being raised in argument by counsel, the Board will look at the Constitutional Questions Act Chapter 51 R.S.N.S., 1967, as amended, (hereinafter referred to as the "Constitutional Questions Act") to see if that provincial statute offers any guidance on this Charter issue. Until 1985, the Constitutional Questions Act was an innocuous statute dealing with governmental references to the "Court" as therein defined and was of little interest to private parties before the ordinary courts and before the inferior tribunals and had no practical application to the rights and duties of such parties before either. The 1985 amendment to the Constitutional Questions Act, assented to on May 17th, 1985, defined "Court" (Spelled in the amendment with a small "c") for the purposes of Section 9 as meaning the Supreme Court, a County Court, a Provincial Magistrate's Court or a Family Court, or a judge of any of those courts. It then goes on to say, in Section 9(2):

> "Where, in a court of the Province, in a proceeding other than a proceeding where the Attorney General is a party, is represented by counsel or has appointed counsel
>
> (a) the constitutional validity or constitutional applicability of any law is brought into question; or...
>
> the court shall not adjudge the law to be invalid or inapplicable nor shall it grant the remedy until after notice is served on the Attorney General for the Province in accordance with this Section."

The Provincial Crown has, at the very least, by this new departure, attempted to keep itself au courant with private disputes before the courts in which are raised constitutional issues concerning any law and, should She wish, She can engage in the case before such law is struck down. This statute does not purport to give the Attorney General any right to notice in a case where the questioned law will be upheld as constitutionally valid.

The Constitutional Questions Act requires notice only from the bodies listed therein. Under this statute, the Board has no duty to notify the Attorney General of a constitutional challenge made before it which, if made before a court listed, would trigger a notification of the Attorney General.

The Constitutional Questions Act defines "Court" and it defines "court" within its text for limited purposes in each separate section, but makes no specific definition of "court of competent jurisdiction" mentioned in Section 24(1) of the Charter. The definition of "court" in the Constitutional Questions Act includes so-called "Section 96" courts (as originally brought into being under the "old" British North America Act) and it includes, for a lack of a better term, "non-Section 96" courts as well. In terms of case load numbers, number of judges affected, number of parties affected the Constitutional Questions Act has a potential for much more application in "non-Section 96" circumstances than in "Section 96" circumstances.

Before the Board is able to find it should interpret the Planning Act in light of the Charter, the Board must address the argument that the Nova Scotia Legislature, by omitting the Board from its list of courts in Section 9 of the Constitutional Questions Act, intended that the Board have no power to apply the Charter to statutes confering powers, duties and jurisdictions upon the Board. Several other bodies, having some adjudicative functions of greater or lesser common application, are also not listed in said Section 9. The Public Utilities Board (a non-Section 96 body), a body quite similar in function and makeup to the Board (but having a much longer history than the Board), is not so listed. The Small Claims Court, of recent but pre-*Charter* origin, having a broad jurisdiction over many matters below the Supreme Court Trial Division range, staffed by part-time adjudicators appointed for terms a maximum of two years at a time, is not listed either. The Court of Probate, a court of limited but ancient function pre-dating Confederation, recognized in the original *British North America Act* as a particular provincial court in its own right, is also not mentioned in Section 9 of the *Constitutional Questions Act*. Thus adjudicative functions of many differing kinds have been excluded from the provisions of that statute. Perhaps the provincial legislators intended that these bodies not apply the *Charter* in interpreting the law within their respective jurisdictions. Perhaps the legislature intended that the *Constitutional Questions Act* would provide notice to the Attorney General of constitutional challenges to legislation in those adjudicative bodies in which such challenges would most frequently arise, or in which the government of the day is not directly involved, as of right, ab initio.

The Minister of Municipal Affairs is a party, as of right ab initio, to all proceedings before the Board and he receives notification of commencement of all proceedings before the Board and, as well, timely notice of all Board hearings. On behalf of the government of the day, he can decide how much, or how little, he wishes to participate in any particular proceeding before the Board. See section 27 of the Municipal Board Act.

There are thus many valid reasons, other than the one argued, for the legislature to have passed Section 9 of the Constitutional Questions Act none of which bear on the duty of the Board, in a positive way, in this appeal.

If, however, the legislature intended to restrict the meaning of "court of competent jurisdiction" (for the French see infra) in Section 24(1) of the Charter to only those courts listed in Section 9 of the Constitutional Questions Act then, to the extent that was the legislature's intention, the intention must fail because it attempts to limit the Charter's definition of court of competent jurisdiction derived from the text of the Charter itself read in both official languages which leads to the inescapable conclusion that the phrase includes this Board. Section 52(1) of the Charter (supra) makes Section 24(1) of the Charter prevail over Section 9 of the Constitutional Questions Act to the extent there is any inconsistency between them.

CHARTER, FRENCH & ENGLISH VERSIONS

In the French version of the Charter, Section 24(1) reads (with underlining courtesy of the Board and without proper accenting since the Board has no access to a bilingual keyboard)

> "Tout persone, victime de violation ou de negation des droits ou libertes qui sont garantis par la presente charte, peut s'addresser a tribunal competent pour obtenir

> la reparation que le tribunal estime
> convenable et juste eu egard aux
> circonstances". (emphasis added)

The underlined words in the French version of Section 24(1), seem to find their nearest English equivalent in the English version of Section 24(1) in the words "court of competent jurisdiction" and "court" respectively.

The English side of the index to the Statutes of Canada refers to, in English, "Supreme Court" while cross-referencing, in italics brackets and French "(Cour Supreme)". Regardless of the non-bilingual aptitudes of the Board, as constituted for this appeal, it is apparent that "court" in English, used in a context of law, could mean something different than "tribunal" in French used in the same context. Could it be that "tribunal" in French means, or includes, "tribunal" in English? In English, a body such as the Board is commonly characterized as a tribunal often modified by the descriptive adjective "inferior".

1. "TRIBUNAL" v. "COURT"

Attorney General of Quebec v. Blakie et al [1979] 2 S.C.R. 1016 /11/ is published, in that citation, in both official languages. In Blakie /11/, the English words "court", "tribunal", and variants of the same, are used throughout the decision in translation from the French decision, or, perhaps, vice versa. The French version of the same decision has the words "cour", "tribunal", and variations of the same also used throughout its text. A proper understanding of that decision should help the

Board to come to a true meaning of the words "court of competent jurisdiction" found in the Charter Section 24(1).

As part of its study of Blakie /11/, the Board extracted from that case many of the various references, in English, to courts, tribunals, and the like and tried to compare them, as found in the context of that case, with the French version of the same words. The results of that comparison are found, expressed in tabular form, in Appendix "B" to this decision.

This Board will take notice that the Court in Blakie /11/ must have as much, if not more, linguistic skill as any Court in Canada (certainly more than this unilingual Board) in the two official languages. The Board is eager to seek guidance from that court in the discharge of the Board's duties in resolving the present appeal. Blakie /11/ is a pre-Charter decision but, at the very least, it should be taken as an excellent guide for the respective meanings, in a legal context, of the precise legal import of English words and of their French equivalent (or vice versa if you prefer) when used in statutes designed to be applied with both languages, concurrently, having equal validity. Sections 2, 16, 17(1), 18(1), 19(1), 21, 55, 56, 57 of the Charter, indicate clearly that the Charter is intended to be read, with equal validity, concurrently, in both official languages.

2. CHARTER AS A STATUTE

The Charter can also be categorized a statute (in modern parlance it could be probably called a "super" statute) since it was passed by one or more parliaments and subsequently received Royal Assent. It is called an Act, and can be amended by various parliaments in accordance with its own contents. A case supporting this proposition is Shewchuk /9/ at page 456 "...under s. 15(2) of the Charter which was not ... a statutory provision [emphasis of the Board] available to the court in deciding R. v. Big M /8/". The same point is made somewhat differently in an apparently contrary case (Re Johnson and The Queen in the right of Ontario 16 D.L.R. (4th) 443 /12/ at page 445 "While the Constitution is not technically [emphasis by the Board] a statute, ...").

REMEDIAL READING OF FRENCH & ENGLISH VERSIONS OF CHARTER

A careful reading of Blakie /11/ satisfies the Board that the French word "tribunal" is broad enough to encompass the English words "court" and "tribunal" as they are discussed, above, in this decision. This lesson is, perhaps, most clearly spelled out, in the French text, on page 1030 of Blakie /11/ where it states:

> "..., qu'elles soient appelees tribunaux, cours ou organismes ayant pouvoir de rendre la justice. ...s'appliquent dans les deux cas."
> (the emphasis here is the Board's)

Section 24(1) of the Charter's English version uses "a court of competent jurisdiction" while the French version uses, as the equivalent to the English version, the expression, quoted above, "un tribunal competent pour obtenir la reparation".

Section 57 of the Charter says:

> "The English and French versions
> of this Act are equally authoritative."

The Board holds the opinion that the Charter requires a remedial reading and must be interpreted, in the case of any ambiguity, in favour of extending, rather than restricting, rights. Re Johnson /12/ again at page 445 "...it is a higher law and a broad interpretation of it must be taken ...". R. v. Big M /8/ at page 524 "The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection." Re Weinstein et al and Minister of Education for British Columbia (1985) 20 D.L.R. (4th) 609 /13/ at page 621 "... that it is" right to apply the rule of liberal construction to the fundamental freedoms in the Charter" it "does not empower courts to construct edifices of policy without regard for the plain meaning of the words of the Charter"." If the French meaning is broader than the English meaning, for example, as both meanings are equal, the English meaning will be broadened to fit the French meaning: the French meaning will not be narrowed to fit the narrower English meaning. In a given case, of course, the French meaning might have to be broadened to meet the broader meaning of its English equivalent.

"RESPECTABLE" VIEW OF THE PURE MEANING, IN ENGLISH ALONE, OF "COURT OF COMPETENT JURISDICTION"

An English (from England) pre-Charter decision cited in Charter of Rights and Administrative Law, The Law Society of Upper Canada Bar Admission Course Materials, 1983-1984 (hereinafter called the Bar Admission Course) at page 135, King v. Garret (1907) 1 K.B. 881 at page 886 /13A/, gives a broad definition of "court of competent jurisdiction". Garret /13A/ is relied on for the source of a statement reading "Court of competent jurisdiction ... only a compendious expression covering every possible Court which by enactment is made competent to entertain a claim ..." which statement encompasses the Board. Thus a finding that the Board is a "court of competent jurisdiction" as envisaged by Section 24(1) of the Charter would not, in itself, be a finding unprecedented in the stream of English jurisprudence. Such a finding would be a remedial interpretation of the quoted Charter phrase" a court of competent jurisdiction "since it would provide to the public an additional forum in which to apply for an appropriate remedy for an infringement of its "constitutional" rights insofar as the jurisdiction statutorily conferred on the Board gave it power over the subject matter of the legal dispute at issue. Such a finding would not reduce the power of ordinary courts (which include e.g. those courts enumerated in Section 9 of the Constitutional Questions Act) to give the constitutional remedy within their jurisdictions.

TEST FOR EXTENT OF POWER OF BOARD

The Bar Admission Course, at page 135 also argues that "It is statutes and laws apart from the Charter that ...confer jurisdiction upon a court ...it is probably true that section 24(1) of the Charter confers upon a court or tribunal no greater remedial authority than such court or tribunal had before the Charter's enactment."

BOARD FUNCTIONS LIKE A COURT

Under Section 34 of the Municipal Board Act, "The finding or determination of the Board upon any question of fact within its jurisdiction is binding and conclusive." This power is "court-like" and, actually, more powerful than the traditional power of an ordinary Nova Scotian trial court to make findings of fact. An appeal court may review an ordinary trial court's findings of facts on jurisdictional errors as well as on certain other circumscribed grounds, but an appeal court can only review the Board's findings of fact when the Board has made findings of fact on matters which lie outside the Board's jurisdiction.

Under Section 32 of the Municipal Board Act, the Board, within its jurisdiction, has exclusive jurisdiction on all matters conferred on it and has authority to hear and determine all questions of law or of fact. Ordinary courts perform much the same functions to a greater or lesser degree within their own respective jurisdictions.

Section 35 of the same act allows an appeal, on leave, on any question of jurisdiction or upon any question of law, to the Appeal Division of the Supreme Court. This appeal right seems closely akin to the appeals provided for under the Crown side appeals for serious federal criminal offences. The vulnerability of the Board's decisions to appeal seems to be less than the vulnerability of the decisions of the County Courts and those of the Supreme Court, Trial Division, when these august bodies are acting in their civil mode. In the ordinary court milieu, numerous choses in actions may be appealed in many and varied ways depending on the law governing the particular appeal in question. The bane of an appeal to a high court hangs over the Board as it does over all ordinary courts except the final court of appeal.

Under Section 39 of the Municipal Board Act, the Board must keep a full and complete record of all proceedings "before the Board" and record all testimony before it. Ordinary courts often have these same duties.

A thorough reading of the various statutes, both general and particular, applying to the Board will give many more illustrations of court-like powers and duties given by the Legislature to the Board (e.g. Sections 20, 7, 9, 3(4), 22, 23, 27, 29, 40, 42, of the Municipal Board Act, inter alia, come readily to mind).

The Board has taken over the assessment appeal function most recently previously exercised in Nova Scotia by the County Court (a s.96 court) and exercises many, but not all, of those assessment appeal functions previously performed by the County Court.

Within its jurisdiction, the Board decides matters that can be of great import to the litigants before it as well as to the public as a whole. Large monetary consequences can, and often do, result from Board decisions. Life styles of many of the inhabitants of entire municipal corporations can be affected, for better or for worse, by certain Board decisions. Property rights, important, or even crucial, to individual citizens' economic wellbeing, or to their general peace of mind, can often be adjusted by the decisions of this Board. Thus one might fairly state that certain matters, on which the Board has "final" say, are akin, in their gravity, to many matters disposed of in the ordinary courts.

Security of tenure of Board members is less than that afforded to holders of appointments to positions on Section 96 bodies. Board members' security of tenure appears to be at least equal to the tenure of appointees to provincial magistrates' courts which courts are generally regarded as courts capable of being "courts of competent jurisdiction."

"NON-SECTION 96 "COURTS" COURTS OF COMPETENT JURISDICTION"

R. v. Big M /8/ at page 499 "The second objection is to the jurisdiction of the Provincial Court regarding the exercise of a prerogative power to declare legislation is invalid. It also must be rejected." Re Holman and The Queen (1982) 2 C.C.C. (3rd) 19 /14/at p. 23 "...the learned provincial court judge was acting within his jurisdiction when he found, rightly or wrongly, the section was not inconsistent with the Canadian Charter of Rights and Freedoms, ...". Re Krakowski and The Queen 41 O.R. 2nd 321 /5/ at page 324 "In most instances it is preferable where the charges are to be tried in the provincial court that the provincial court decide whether the accused has been denied the right ... as guaranteed by the Charter. The provincial court is in position to hear viva voce evidence ... [page 325] ...It is much more satisfactory for the matter to be dealt with at a supervisory or appellate level on the basis of the entire record in the provincial court where all the relevant issues have been considered in one forum, rather than having been litigated piecemeal.

These examples illustrate a point that there is nothing of an overriding nature in the statutorily appointed functions of the Board to disqualify it from being able to qualify, under Section 24(1) of the Charter as a "court of competent jurisdiction" for the purposes, at least, of determining the correct law (and that includes the constitutionally correct law) to matters properly before it.

SOME MORE AUTHORITIES

See Re Nash and The Queen (1982) 70 C.C.C. 490 /15/ at page 494: "The French and English versions of the Charter are equally authoritative according to s. 56 of the Constitution Act ... It should be noted that in the French text the term "un tribunal" is used. "Un tribunal" has a much broader meaning than a court. "Tribunal" is clearly broad enough to encompass the disciplinary panel or any other similar body. Thus I hold that the application [that the panel interpret the Charter] was properly brought before the police disciplinary panel." See also R. v. Big M /8/ at page 532: "If a court or tribunal finds [emphasis by the Board] any statute to be inconsistent with the Constitution, ...".

Blakie /11/, itself, is an authority for the proposition that "tribunal", in French, includes inferior tribunals such as this Board and that rights (in the case of Blakie /11/ language rights) constitutionally established must be made available to the parties (even if corporate) in both "courts" and in inferior tribunals. At Page 1029 Blakie /11/in an unanimous decision in its English text, says "Dealing, at [sic it should read 'as'] this Court is here, with a constitutional guarantee, it would be overly-technical to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society and to refuse to extend to proceedings before them the guarantee of the right to use either French and English by those subject to their jurisdiction." and at page 1030 "It follows that the guarantee in s. 133 of the use of either French or English by any person or in any pleading or process in or issuing from...all or any of the Courts of Quebec applies to both ordinary courts and other adjudicative tribunals." If, as Blakie /11/ says, proper constitutional language guarantees are to be enforced for the benefit of their users by tribunals how much more important that those same tribunals interpret and enforce constitutionally correct substantive law in their deliberations.

The Ontario Labour Relations Board, deriving its existence and membership appointments solely from Ontario Provincial legislation much as this Board derives its existence and membership appointments solely from Nova Scotia Provincial legislation, has had no hesitation in arrogating to itself the duty and the power to interpret the Charter and to apply the Charter to matters brought for decision before it as it goes about its lawful occasions. In Service Employees Union Locals 204 and 210 v. Broadway Manor Nursing Home [1983] O.L.R.B. Rep. 26 /16/ both the majority decision and the dissenting opinion made Charter interpretations, and applied those interpretations to the facts and law before the board. On the Charter issue, the only difference between the decision of the majority and the dissenting opinion was that one side thought there had been Charter violations and the other side (the majority) thought there had been no violations of anyone's constitutional rights. The board implicitly, by their actions in dealing with the Charter issues in the manner it did, found it had power to adjudicate upon Charter matters and to give remedies, when appropriate, to parties before it for violations of those parties' constitutional rights. The board, in Broadway /16/ made no express finding that it had jurisdiction to apply the Charter, but sometimes action speaks louder than words. This action was collateraly attacked in the Ontario Divisional Court which set aside the findings of the Ontario Labour Relations Board. The Divisional Court decision was appealed and cross-appealed to the Ontario Court of Appeal in Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al and two other applications 48 O.R. (2nd) 225 /17/ and the final decision supported the result in Broadway /16/.

In I.L.G.U. vs. Third Dimension Manufacturing Limited [1983] O.L.R.B. 261 /18/ (delivered by the board about a month later than Broadway /16/) the Ontario Labour Relations Board met, head on, the issue of whether or not it could even deal with Charter matters when resolving issues already before the board. At page 264 of that decision, it stated the issue quite clearly when it posed itself the problem thusly "...and secondly, the approach which a tribunal like the Board should take when it is asked, in effect, to declare that a provision of its own statute is unconstitutional. ...We deal with the second issue first. The Charter of Rights and Freedoms establishes for Canadians rights which are of fundamental importance and which must [page 265] be respected at every level of the legal process. All who administer the law are necessarily governed by its requirements and protections. Policemen and prosecutors, for example, must be guided by the rights of a person subject to a criminal charge and arrest. The Courts and tribunals like this Board are governed by the guarantee of fundamental justice enshrined in Section 7 of the Act. In that sense this board must interpret and abide by the Act in its day-to-day proceedings, being ever mindful of the legal paramountcy of the Charter as reflected in the provisions of Section 52(1) of the Canada Act:...In our view the imperatives of Section 52(1)...are inescapable; that cornerstone section imposes a duty on all bodies charged with the good faith administration of laws to insure that the laws which they apply and the procedures by which they are administered are not inconsistent with the provisions of the Constitution. ...in the past this Board, ...has had a meaningful role to play in the framing and resolution of constitutional issues. ...In doing so it must inevitably examine both that statute [the British North America Act] and the judicial precedents which have interpreted its provisions.

A recent decision of the Supreme Court of Ontario, Windsor Airline Services Ltd, (1980) 30 O.R. (2d) at 734-35 (Div. Ct.) has affirmed that when a constitutional issue is raised before the Board it should not merely throw up its hands and pass the matter directly to the courts. The Court took the view that the legal process is better served if the Board makes the pertinent findings of fact and comments on the labour relations and constitutional ramifications of the facts as found, with appropriate reference to the authorities. The Board's approach, effectively endorsed by the Court, was stated as follows in ...[1980]

O.L.R.B. Rep. Feb. 272 at 274:

> "When faced with a challenge to its constitutional jurisdiction the Board has a clear duty to consider and rule on the challenge, and in so doing to recite and analyze the facts as thoroughly as possible. Clear findings of fact, ...will assist the courts in the event of a judicial reivew of the Board's determination...
>
> [AND EARLIER]

[1974] O.L.R.B. Rep. Sept. 629 at 632:

> "The Courts are the great equalizers in the application of constitutional law principles, but neither they nor the parties should be denied the viewpoints of the inferior tribunals-viewpoints based upon the vive voce evidence that comes before them. Only in this way can the courts meaningfully assess the facts upon which the constitutional law principles must be applied.
>
> ...[page 267]...

In our view the foregoing passages point the way to be followed by this Board when forced [sic] with a challenge to its jurisdiction based on the ...Charter. ...In the months and years to come the Charter will be subjected to the refining process of Court review through a progression of individual cases in many branches of the law. This Board, like all tribunals, will be required to be aware of the judicial interpretation of the Charter's provisions and to respect and apply those interpretations in its day-to-day affairs. In our view the Board is no less required to interpret and apply the terms of the Charter ...merely because the process of judicial interpretation of that governing document is in its infant stages."

These Ontario Labour Relations Board (hereinafter called the Ontario Board) cases show a line of thinking which, if followed by this Board, would permit this Board to interpret, and when appropriate, apply the Charter to issues already properly before it. In the context of this case, that would mean that the Board would have to test challenged sections of the Planning Act with any related portion of the Charter. The theme of the Ontario Board's decisions, somewhat cynical in the view of the Board, is that the originating tribunal should find all the facts, apply the ordinary law (as, and to the extent, it is or is not modified by the Charter), and make a decision for the purpose of providing the ordinary courts with material to focus upon as if and when those ordinary courts might be called upon to review the work of the inferior tribunal. This position seems to be supported by the views of Laskin C.J.O. (as he then was) as quoted in Broadway /17/ at page 238:

> "That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong".

The Federal Court has adopted much the same approach in Law v. Solicitor General of Canada et al (1983) 144 D.L.R. (3rd) 549 /21/ when it held at page 553:

> "The Immigration Appeal Board is, within the limits of its jurisdiction as defined by statute, a court of competent

> jurisdiction within the contemplation of Section 24(1) of the Charter. ...The Board is already seised of the matter and competent to decide the issues raised ... The Plaintiff's right of access to appellate tribunals will be substantially identical, in the circumstances, whether the initial determination is made by the board or by this court."

The somewhat cynical view of the Ontario Board, reinforced by the just cited Federal Court decision, might be a factually accurate picture of what actually happens to decisions of inferior tribunals in Ontario when those decisions fall into the hands of the ordinary courts. If that is the law, the Board agrees with the result; namely that inferior tribunals must apply the Charter to the law dealt with before them.

BOARD'S VIEW OF PROPER BOARD CONDUCT WHEN FACED WITH A CHARTER ISSUE

The Board, with all respect, finds great difficulty in accepting the above approach of the Ontario Board as being legally correct - no matter how correct its position may be factually. The Board feels that the correct legal position would be as follows: Only tribunals of competent jurisdiction can give remedies for violations of constitutional rights. For this purpose the Board is a tribunal of competent jurisdiction at least to the extent that it has a prior duty, in the face of a constitutional challenge made before it, to apply the necessary constitutional interpretation to laws controlling the existence and actions of the Board. The Board can only give a constitutional remedy within its usual statutory ambit e.g. the Board could not give an award of costs to a person whose constitutional rights were violated in the course of a planning matter. (To this point there is no major difference from the view of the Ontario Board.)

Now to address what the Board thinks is the proper legal principle in its decision making process dealing with the grafting of constitutional rights to the various statutes it is required or empowered to apply. On constitutional issues (as on all other issues) before it, the Board is to hear all evidence, to study all applicable law, and to rule on all issues properly before it with one view in mind - to make a final and binding decision fully in accord with the law without regard to a possible review or appeal by some other body, judicial or otherwise. It is properly the concern of such other bodies, when exercising their appellate or review jurisdictions over the affairs of the Board, to consider the rights of the parties and to decide whether the Board has dealt with one or more of those rights in legal error. The Board has no duty to second guess itself; the appellate courts and the review courts can second guess the Board to the full limits of their jurisdiction. In any hearing, the Board should not consider those courts or what they might or might not do in future to the subject matter then before the Board. The Board acting correctly within its jurisdiction makes a final decision which is right and no amount of appeal or review can change that final decision. (If the Board acts incorrectly or without its jurisdiction, and is not taken to review or appeal, then, by default, that particular decision becomes "right" for the purposes of that particular dispute only.) If the Board acts incorrectly or without its jurisdiction, then the subsequent review or appeal will correct the error made by the Board and the "wrong" Board decision will be made "right" and then become the final decision of the Board. Since the Board has no power to make a "wrong" decision and a positive duty to make only a "right" decision it follows that it need not go beyond its statute in preparing for possible subsequent judicial appeals and reviews. Applying this theory the Board cannot err, and thus it should ignore (or not contemplate) in its decision-making process, the likelihood (or even existence) of a possible subsequent review or appeal.

PREVIOUS BOARD DECISIONS ON CHARTER ISSUE

The Board in John J. MacDonald v. Town of Westville 1985 M.B. (volume B) 32/24/ (quoted in this decision from the filed decision and page numbers which may be found in file NSMB-458-84-P, pages 1 to 32 inclusive) dealt with Charter issues with a different conclusion than the Ontario cases cited.

If MacDonald /24/ facts required the Board to arrive at the rulings it made in that case then this Board would have difficulty in following the result of the Ontario decisions. At page 2 of MacDonald /24/ a general statement from the Notice of Appeal implies a violation of the Appellant's rights established by Sections 15(1) and 12 of the Charter.

At all times relevant to that appeal Section 15(1) was not yet in force in Nova Scotia (it was proclaimed here on April 17th, 1985). Except for any pre-Charter rights as recognized by Section 26 of the Charter, equality before the law, as defined by Section 15(1) of the Charter was not open for consideration by the Board in MacDonald /24/. Section 12 of the Charter did not have any application to the facts in MacDonald /24/ and still would not if that appeal were to be decided today. These were the only Charter sections bearing at all upon the facts of MacDonald /24/ and since one section was not yet in force and the other had no possible application to the appeal, the Board's findings could stand on other grounds as no constitutional rights were properly arguable before it. Thus the blanket statement of the Board's inability, because of its status as an inferior tribunal, to interpret its legislation in light of the constitution, while of great persuasive value, is dicta and this Board does not feel the imperative to be bound by that statement in light of the other precedents canvassed by the Board in this appeal.

For all the above reasons, the Board assumes jurisdiction to determine the constitutional questions posed by the Appellant herein.

CHARTER VIOLATIONS HEREIN?

Its next question must now be disposed of. You will recall that the Appellant then alleged that its equality rights made available to it by Section 15(1) of the Charter were violated by the effect of Section 63(5) of the Planning Act.

BODY CORPORATE EQUALITY RIGHTS?

Mr. Melnick argued that the Appellant was not an individual within the meaning of Section 15(1) of the Charter, and thus had no equality rights to be dispossessed of. Some support for this argument can be found in the pre-Charter case of R. v. Colgate Palmolive Ltd. 8 C.C.C. (2nd) 40 /19/. Re Weinstein /13/ at page 619:

> "But the ... Charter bestows no rights or freedoms on creatures of statute like the Board or on members of the Board in that capacity . ... [p. 620] ...Persons or individuals are entitled to those rights and freedoms. They are not guaranteed to statutory bodies such as the Vancouver School Board or to members of the Board acting in their official or elected capacity."

The Board sidesteps this issue in the present appeal, and notes that the Five Interested Parties represented by Mr. Melnick herein are individuals within the meaning of Section 15(1) of the Charter and have constitutional rights herein equal to any constitutional rights of the Appellant. The word "equal" means the converse is also true and therefore the Appellant has any individual constitutional rights available to the Interested Parties. From the preceeding part of the decision it is clear that the Interested Parties, at least, would have the right to have this Board interpret the Planning Act in light of the Charter and since they have these rights in a condition of equality with other parties in the appeal then the Appellant has, as a condition of such equality, the same rights. The Board, for the purposes of disposing of this appeal, does not have to find that the Appellant is an individual within the meaning of Section 15(1) of the Charter. It need only find that the Appellant is equal to some party or parties before the Board who do have equality rights. In this appeal, the Board has so found, and leaves for another day (and perhaps another forum), the effect of Section 15(1) of the Charter on Board decisions when all parties before the Board are bodies corporate rather than human bodies corporeal. R. v. Big M /8/ allows a corporate body to defend itself on a religious freedom issue and rely on the Charter religious protections for a valid defence to a criminal prosecution of a non-religious artificial person.

CHARTER VIOLATION SPECIFICALLY CLAIMED

The Appellant has no complaint under the Charter that the conduct of the Board to date has violated any constitutional right (vicarious or otherwise) of the Appellant. It complains, in essence, that Section 63(5) of the Planning Act places a reverse onus burden or at least a heavier burden (one heavier than on other parties relying on the Planning Act), and, therefore, an unconstitutional burden, upon the Appellant. It submits the Board should not, therefore, consider applicable such Section 63(3) in arriving at its decision herein.

Section 63(3) of the Planning Act, sets out what the Board must determine on this, as on any, appeal. If the Board determines that the decision of Council appealed reasonably carries out the intent of the M.P.S., then that is the end of the matter and the appeal will be dismissed. Under the same subsection, the only other possible determination of the Board, within the context of this appeal, is that the decision of Council does not reasonably carry out the intent of the M.P.S. Given that determination under Section 63(3), the prohibition on the Board allowing the appeal, apparently imposed by Section 63(5), has already been dispensed with in the determination under Section 63(3). Regardless of the vast difference in wording, Section 63(5) does not add or detract meaning and effect from Section 63(3); at best Section 63(5) merely restates, in different words, Section 63(3), ensuring by such repetition that the Board understands the limits of its powers; at worst it is an unnecessary bit of excess verbiage. In either case, Section 63(5) has no effect, in itself, on the outcome of any appeal made under the Planning Act and, since it can have no effect on the outcome of any appeal (except to reiterate to the Board in unmistakeable language its duty to make a determination - one out of a possible two) under Section 63(3), it cannot have the effect of infringing on any individual's constitutional rights direct or vicarious. By this reasoning, no constitutional rights of the Appellant have been violated in the context of this Board's ability and duty to enforce the same. As far as the Board is concerned, Section 63(5) of the

Planning Act may be superfluous but it is constitutional.

"REASONABLE LIMITS"

If, on the other hand, there is some extra burden placed upon the Board, and through the Board, on the Appellant, by a meaning present in Section 63(5) not already present in Section 63(3), then that extra burden is the type of burden contemplated in the phrase "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." found in Section 1 of the Charter. An extra burden placed on an appellant, by provisions of the Planning Act, between the original council decision and the hearing before an appeal tribunal is, in this case, a reasonable limit prescribed by law which can be demonstrably justified in our free and democratic society. Each person should, and in our system does, have a forum of first instance in which to air his legal grievances and to obtain therein, with the application of due process and the correct law to the appropriate facts, a final and fair decision of his legal grievance. Upon having had this opportunity for a final decision in the forum of first instance, it is reasonable to allow for error in the forum of first instance (as has traditionally been done in our legal system) by providing systems of appeal to other and "higher" fori, culminating most often at the Supreme Court of Canada level where the ability to correct errors becomes truly "final" and, beyond which the ability to correct the errors of that body exist only outside the usual legal process. If, at each stage of the appeal process, the burden on the would-be-appellant did not become more onerous and therefore more exclusionary all cases, no matter how correctly tried in the lower fori, would all end up in the Supreme Court of Canada and thereby cause, if not a complete breakdown in our justice delivery system, certainly an intolerable delay in the delivery of justice. The legislature, in its unquestioned wisdom, under the Planning Act, made the Council the first forum for final decision to be applied to the subject matter of this appeal. With the same wisdom, it made this Board the first avenue of appeal available to correct any error made in that first forum. Even at this first level of appeal, it is reasonable that the exclusionary process be at least commenced and that the requirements for success before the Board be both different and more difficult than the requirements for success before the Council. Thus the difference, if any, of burden placed on the Appellant herein between the time of the council decision appealed from and the hearing by the Board of the appeal is, in this appeal within the reasonable limits set out above. See Re Singh /6/ at page 193:

> "...the rights and freedoms set out
> in the Charter are fundamental to the political
> structure of Canada [p. 194]
> guaranteed by the Charter as part of the
> supreme law of the nation. ...in determining
> whether a particular limitation is a reasonable
> limit prescribed by law which
> can be "demonstrably justified in a free
> and democratic society" it is important to remember
> that the Courts are conducting
> this inquiry in light of a commitment to
> uphold rights and freedoms set out in other

> sections of the Charter. The issue in the present case is not simply whether the procedures set out in the Immigration Act for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the Appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice. Seen in this light ... that the type of utilitarian consideration ... can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. ... The principles of natural justice and procedural fairness which have been long espoused by our Courts, and the constitutional entrenchment of the fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges ... the basis for justification ... must be more compelling than any advanced in these appeals."

"Judicial" administrative convenience, as outlined above is a valid consideration when one tests s.63(5) of the Planning Act against "equality before the law" rights enshrined in s. 15 of the Charter. R. v. Big M. /8/ at page 531 says:

> "At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable - a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question".

R. v. Oakes (1983) 2 C.C.C. (2nd) 339 /20/at page 351:

> "...I am of the view ... that s. 1 of the Charter limits Parliament's power ... by imposing the limitation that any qualification or restriction of that right [in this case the right of the accused to be presumed innocent] must be such as can demonstrably justified in a free and democratic society, ...". R. v. Shewchuk /9/ also considered the meaning of the words "... reasonable limits within a free and democratic society."

Re Gittens /10/at page 691 has this to say on the topic of this paragraph:

> "Execution of the deportation order [p. 692] is prescribed by law. The reasonableness of the right of a free and democratic state to deport alien criminals is self-evident [emphasis by the Board] and, therefore, demonstrably justified."

R. v. Crate 7 C.C.C. (3rd) 127 /22/ has this to say about the Canadian Criminal Code's taking away the accused's right to a trial by jury in appropriate circumstances at p. 130:

> " ... any limitation s. 526.1 of the Code may have on s. 11(f) of the Charter is a reasonable limitation and is demonstrably justified in a free and democratic society (s. 1 of the Charter). It is eminently reasonable and completely justifiable to say to an accused who has called upon the state to empanel a jury and, more importantly, called upon his fellow citizens to answer their duty to serve as jurors, that he cannot impose that obligation a second time [on the same information] unless he meets the requirements set out in s. 526.1. We are not persuaded to the contrary view by the absence of similar legislation in other free and democratic societies."

In Nova Scotia the Trial Division of the Supreme Court in R. v. Johnstone, Goler, and Johnstone 68 N.S.R. (2nd) 302 /23/ held, at page 308, that the method of empanelling of Nova Scotia criminal juries did not restrict the accused's right to a jury trial and, if it did:

> "... the [violation] could be demonstrably justified as a reasonable limit under Article 1."

IN SUMMARY the Board notes:

1. That it is a "court of competent jurisdiction" for Charter application purposes only for one or more of the following reasons:

   (a) that its function is so court-like that it cannot, for the instant purposes, be distinguished from ordinary courts.

   (b) that the Board is a tribunal and the Charter specifically recognizes tribunals as competent for the purposes of constitutional interpretation in appropriate circumstances.

2. That it has checked the Planning Act as requested herein by the Appellant and found no violation of its constitutional rights or, in the alternative, that if there were any violation of its rights those violations were reasonable in the circumstances.

APPENDIX "B"

COMPARISON OF CERTAIN WORDS AND PHRASES AS FOUND IN:

ATTORNEY GENERAL OF QUEBEC v. BLAKIE ET AL (1979) 2 S.C.R. 1016 /11/

PAGE NO.	ENGLISH	FRENCH
1016	The Court of Appeal	La Cour D'appel
	and of the courts	et de la justice
	the Superior Court of...the Courts	La Cour superieure de la justice
1017	the Superior Court	la Cour superieur
	Quebec Court of Appeal	La Cour d'appel du Quebec
	this Court	cette Cour
	This Court	la Cour
	The Court	La Cour
	the Courts of Canada or Quebec	les tribunaux du Canada ou du Quebec
	in the Courts of Canada or of Quebec	devant les tribunaux du Canada ou du Quebec
	"any of the Courts of Quebec"	"les tribunaux du Quebec"
1018	so-called s.96 Courts	cours visees par l'art 96
	Courts established by the Province and administered by provincially-appointed judges.	cours creees par la province et ou la justice est administree par des juges nommes par elle
	the Court of Appeal of Quebec	la Cour d'appel du Quebec
	of the Superior Court	de la Cour superieure
1019	The Court	La Cour
	of the Quebec Superior Court	de la Cour superieure du Quebec

	Quebec Court of Appeal	La Cour d'appel du Quebec
	before the Quebec Superior Court and before the Quebec Court of Appeal	au Cour superieure et Cour d'appel du Quebec
1020	Manitoba Court of Appeal	la Cour d'appel du Manitoba
	this Court	La presente Cour
	and of the Courts	et de la justice
	to the courts and to bodies discharging judicial or quasi-judicial functions	aux tribunaux et aux organismes exercant des fonctions judiciaires ou quasi-judiciaires
	by bodies discharging judicial or quasi-judicial functions	des tribunaux et des organismes exercant des fonctions judiciaires ou quasi-judiciaires
	by the courts and by bodies discharging judicial or quasi-judicial functions	par les tribunaux et les organismes exercant des fonctions judiciaires ou quasi-judiciaires
1021	in or issuing from any Court of Canada	par-devant les tribunaux ou emanant des tribunaux du Canada
	This Court	la Cour
1022	the Quebec Court of Appeal	la Cour d'appel du Quebec
	this Court	la Cour
	"procedural documents" in judicial or quasi-judicial proceedings	des "pieces de procedure" de nature judiciaire ou quasi-judiciaire
	in the Courts of Quebec	devant les tribunaux du Quebec
	"bodies discharging judicial or quasi-judicial functions"	"des tribunaux et des organismes exercant des fonctions judiciaires ou quasi-judiciaires"
	of judgments of the Courts	des jugements des cours

	of...decisions of "judicial or quasi-judicial" tribunals	aux decisions des tribunaux "judiciaires ou quasi-judiciaires
1023	by this Court	par la Cour
	and Courts of Quebec	et les tribunaux du Quebec
	of the Courts of Quebec	des tribunaux du Quebec
1025	the Quebec Court of Appeal	la Cour d'appel du Quebec
	the Courts of Canada	les tribunaux du Canada
	in the...Courts of Quebec	devant les tribunaux du Quebec
	the Courts below	les cours d'instance inferieure
	the Court	la Cour
1027	in the Courts of Canada or of Quebec	devant les tribunaux du Canada ou du Quebec
	the Quebec Court of Appeal	la Cour d'appel du Quebec
	of delegated legislation	de la legislation deleguee
	Court pleading, Court processes	des procedures judiciaires
	before the Courts and Court judgments	devant les tribunaux et de leurs jugements
	"...and the courts in Quebec"	"...de la justice au Quebec"
1028	term "Courts"	du mot "justice"
	to include "bodies discharging judicial or quasi-judicial functions"	pour comprendre les "organismes exercant des fonctions judiciaires ou quasi-judiciaires"
	"Courts of Quebec"	"tribunaux de Quebec"
	"any of the Courts of Quebec"	"les tribunaux de Quebec"

	so-called s. 96 Courts	cours visee par l'art 96
	Courts established by the Province and administered by provincially-appointed Judges	cours creees par la province et ou la justice et administree par des juges nommes par elle
	this latter class of tribunal	cette dernier categorie de tribunaux
	judicial power	pouvoir judiciaire
	not courts in the traditional sense	ne sonts par des cours au sense traditionnel du terme.
	statutory agencies which are adjudicative	d'organismes crees par la loi qui ont pouvoir de rendre la justice
	judicial bodies	des organismes judiciaires
	of Courts	des cours
	other adjudicative bodies	d'autres organismes ayant pouvoir de rendre la justice
	non-curial adjudicative agencies	d'organismes non judiciaires ayant pouvoir de rendre la justice
1029	Court proceedings	les procedures juriciaires
	adjudicative agencies for Courts	les cours par des organismes ayant pouvoir de rendre la justice
	Privy Council	Le Conseil prive
	this Court	(nothing directly in French text)
	non-curial adjudicative agencies	d'organismes non judiciaires investis du pouvoir de rendre la justice
	the Privy Council Appeals	renvoi sur l'abolition

	Reference	des appels au Conseil prive
1030	the Courts of Quebec	des tribunaux du Quebec
	judicial power	au pouvoir judiciaires
	courts or adjudicative agencies	tribunaux, cours ou organismes ayant pouvoir de rendre la justice
	extend to both	dans la deux cas
	All or any of the Courts of Quebec	tous les tribunaux... ou...des tribunaux de Quebec
	both ordinary Courts and other adjudicative tribunals	tant aux cours ordinaires qu'aux autres organismes ayant pouvoir de rendre la justice
	the Courts of Quebec	les cours du Quebec
	its other adjudicative tribunals	ses autres organismes ayant pouvoir de rendre la justice
	such bodies	ces organismes

APPENDIX "C"

CASES CITED IN THE ATTACHED DECISION BY NUMBER

/1/ D. Agatha Rogers 8 P.A. Decisions 1035;

/2/ Glow-Worm Investments Ltd. v. Atlantic Shopping Centres Ltd. and Provincial Planning Appeal Board (1981) 46 N.S.R. (2nd) 223 (includes both trial division and appeal division decisions;

/3/ Glow-Worm Investments Limited 10 P.A. Decisions 1427;

/4/ R. v. M. (1982) 70 C.C.C. (2nd) 123;

/5/ Re Krakowski and The Queen 41 O.R. (2nd) 321;

/6/ Singh v. Minister of Employment & Immigration 12 Admin. L.R. 137 (also 17 D.L.R. (4th) 422);

/7/ Re Bird and Peebles and The Queen 12 C.C.C. (3rd) 523;

/8/ R. v. Big M Drug Mart Ltd. (1985) 3 W.W.R. 481;

/9/ Shewchuk v. Ricard and Attorney General of British Columbia [1985] 6 W.W.R. 436;

/10/ Re Gittens and The Queen 137 D.L.R. (3rd) 687;

/11/ The Attorney General of the Province of Quebec and Peter M. Blakie, Roland Durand and Yoine Goldstein et al [1979] 2 S.C.R. 1016;

/12/ Re Johnson and The Queen in right of Ontario 16 D.L.R. (4th) 441;

/13/ Re Weinstein et al and Minister of Education for British Columbia et al (1985) 20 D.L.R. (4th) 609;

/13A/ King v. Garret (1907) 1 K.B. 881;

/14/ Re Holman and The Queen (1982) 2 C.C.C. (3rd) 19;

/15/ Re Nash and The Queen 70 C.C.C. (2nd) 490;

/16/ Service Employees Union, Local 204 v. Broadway Manor Nursing Home [1983] O.L.R.B. Rep. 261;

/17/ Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al and two other applications 48 O.R. (2nd) 225;

/18/ I.L.G.U. v. Third Dimension Manufacturing Limited [1983] O.L.R.B. Rep. 261;

/19/ R v. Colgate Palmolive Ltd. 8 C.C.C. (2nd) 40;

/20/ R v. Oakes (1983) 2 C.C.C. (3rd) 339;

/21/ Law v. Solicitor-General of Canada (1983) 144 D.L.R. (3rd) 549;

/22/ R. v. Crate 7 C.C.C. (3rd) 127;

/23/ R. v. Johnstone, Goler and Johnstone 68 N.S.R. (2nd) 302;

/24/ Re. John J. MacDonald (1985) Vol.(B) M.B. 32; File No. NSMB-458-84-P;

OTHER MATERIALS READ IN PREPARING THIS DECISION

A-1 R. v. Burns 2 C.C.C. (3rd) 283;

A-2 Re: Koumoudouros and Municipality of Metropolitan Toronto 37 C.C.C. 193;

A-3 Re: Broddy et al and Director of Vital Statistics 142 D.L.R. (3rd) 151;

A-4 R. v. Leggo 69 C.C.C. (2nd) 443;

A-5 R. v. Silber 69 C.C.C. (2nd) 147;

A-6 R. v. Toker and McKinney (1984) 13 C.C.C. (3rd) 472 (notes thereon);

A-7 Re: Lavers and Minister of Finance (1985) 18 D.L.R. (4th) 477;

A-8 Ontario Human Rights Commission et al v. Borough of Etobicoke 132 D.L.R. (3rd) 14;

A-9 Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria 124 D.L.R. (3rd) 193; and

A-10 Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria 105 D.L.R. (3rd) 707;

A-11 Kenneth S. Bell and The Ontario Human Rights Commission and Carl McKay [1971] S.C.R. 756;

A-12 Alkali Lake Indian Band v. Westcoast Transmission Company Limited et al 57 B.C.L.R. 110;

A-13 Re: Starlight Drive-In (1978) Ltd. and Hewitt 12 D.L.R. (4th) 391;

A-14 Oakwood Development Ltd. v. St. Francois Xavier [1985] 6 W.W.R. 147;

A-15 C.U.P.E. Local 963 and New Brunswick Liquor Corporation [1979] 2 S.C.R. 227;

A-16 R. v. Robert Bruce Richardson 12 W.C.B. 330;

A-17 Re: Bank of Nova Scotia 10 W.C.B. 429;

A-18 Re: Legal Services Society and Brahan 148 D.L.R. (3rd) 692;

A-19 Re: Attorney-General of Canada et al and Gould (1984) 13 D.L.R. (4th) 485 see note page 491;

A-20 Re: Gandam and Minister of Employment and Immigration (1982) 140 D.L.R. (3rd) 363;

A-21 R. v. Lyons (no. 2) (1982) 70 C.C.C. 1;

A-22 Re: R. and Brooks (1982) 1 C.C.C. (3rd) 506;

A-23 R. v. Belton 31 C.R. (3rd) 223;

A-24 R. v. Peters (1982) 16 M.V.R. 84;

A-25 R. v. Wilson (1982) 37 A.R. 170;

A-26 R. v. Morgentaler, Smoling and Scott 16 C.C.C. (3rd) 1;

A-27 R. v. Halpert et al 48 O.R. (2nd) 249;

A-28 Consolidated-Bathurst Packaging Limited v. I.W.A. Local 269 et al 16 Admin. L.R. 37;

A-29 Denis Blanchard and Control Data Canada Limited [1984] 2 S.C.R. 476;

A-30 R. v. The Corporation of the City of Sault Ste. Marie [1978] 2 S.C.R. 12199;

A-31 R. v. Valente 64 N.R. 1;

A-32 P.P.G. Industries Ltd. and Attorney General of Canada [1976] 2 S.C.R. 739;

A-33 Committee for Justice v. National Energy Board [1978] 1 S.C.R. 369;

A-34 Capital Cities Communications Inc. v. C.R.T.C. [1978] 2 S.C.R. 141;

A-35 Roncarelli v. Duplessis [1959] 1 S.C.R. 121;

A-36 Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police and Attorney-General for the Province of Ontario [1979] 1 R.C.S. 311;

OTHER RANDOM READINGS

B-1 The Charter of Rights as a Bilingual Instrument, J.P. McEvoy, 64 C.B.R. 155;

B-2 Canadian Charter of Rights Annotated Volumes 1 and 2 published in 1986 by Canada Law Book Company;

B-3 Session Papers: Main Speakers Second Annual Conference of Canadian Administrative Tribunals May 5th to May 8, 1986, Queen's University, Kingston, Ontario.

Heritage Motors Ltd. v. City of Dartmouth

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-2 TO C-2 TO PERMIT CONTINUANCE OF USE AS MOTOR VEHICLE PARKING LOT AS PART OF AUTOMOBILE SALES AND REPAIR BUSINESS--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, SS. 16(1), 29--PLANNING ACT, SS. 63(1)(b),(3),(4),(5)

This is an appeal from a decision of the Council of the City of Dartmouth refusing to rezone part of a parking lot used for the parking of motor vehicles in the course of the Appellant's automobile sales and repair business, from R-2 (Medium Density Residential) to C-2 (Commercial). The change would allow the Appellant to legally continue this use. The City's planning staff recommended that the rezoning be granted. Residents in adjacent homes objected to the rezoning.

HELD: The appeal is allowed. The Board instructs Council to change the zoning from R-2 to C-2.

The Board has a duty under s. 63(3) of the Planning Act to determine whether the decision of Council reasonably carries out the intent of the Municipal Planning Strategy (MPS), and, under s. 63(5), not to allow the appeal unless the Board determines the decision cannot reasonably be said to carry out the intent of the MPS. The City argued that the Board must take the "worst case scenario" when contemplating the uses to which the rezoned lands may be put after rezoning. However, under the present wording of the MPS, it is the proposal put forward by the applicant which Council must consider. If Council did consider the "worst case scenario" under C-2 zoning, then its decision did not reasonably carry out the intent of the MPS as it now stands. All knowledgeable witnesses were happy with the present use. Lack of compatibility with adjacent uses can be the only defect in the proposal, and when adjacent uses are characterized as a mixed residential and commercial "development form," the subject rezoning is fully compatible. Even if Council could adopt the "worst case scenario" the proposal would reasonably carry out the intent of the MPS. The City did not call any planning expert to rebut the development officer of the City, subpoenaed and called by the Appellant. The Board is entitled to infer that there was probably no responsible expert in planning to rebut his testimony. This reinforces the Board's view that it should adopt as its own the development officer's opinion. Council's refusal to rezone cannot reasonably be said to carry out the intent of the MPS.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983 Chapter 9;

- and -

IN THE MATTER OF: An appeal by HERITAGE MOTORS LIMITED, a body corporate, of Dartmouth, APPELLANT, from the decision of the Council of the City of Dartmouth, RESPONDENT, made on March 11, 1986 refusing the Appellant's application to rezone its property at 3 Ferguson Road, Dartmouth, from R-2 (Medium Density Residential) to C-2 (Commercial).

BEFORE:	RICHARD L. WELDON, Member
COUNSEL:	H.J. DICKEY, Esq., on behalf of the Appellant, Heritage Motors Limited;
	MICHAEL MOREASH, LL.B., for the City of Dartmouth, Respondent

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's July 24, 1986 sittings at the Board Room of the Expropriations Compensation Board, 1660 Hollis Street, 9th Floor, Room 904, Halifax, Nova Scotia. The hearing was held in Halifax rather than Dartmouth for the convenience, and with the consent of, the parties who actively participated in the preparation for the hearing. The hearing commenced at 10:00 A.M. and evidence and argument ended at about 12:20 P.M. The Board, together with the Clerk of the Board, then took a view of the areas mentioned in the evidence accompanied by Mr. Dickie, Mr. Moreash and one of the witnesses, Mr. Stewart.

Mr. Dickie, Solicitor for the Appellant, called Glenn L'Esperance by subpoena as his sole witness. On behalf of the City, Mr. Moreash called two witnesses, Wilfred Ferguson and Adair Stewart. Alderman John Woods spoke on his own behalf.

The Notice of Appeal was filed with the Board, March 25, 1986 and dated March 25, 1986. The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman decided it needed no amendment. The Appellant undertook to pay the costs of advertising the Notice of Hearing.

The Appeal seeks to have the Board reverse the Council's decision of March 11, 1986 refusing to rezone part of the parking lot (hereinafter referred to as 3 Ferguson Road) now used for the parking of motor vehicles in the general course of the Appellant's automobile sales and repair business, from its present zoning of R-2 (Medium Density Residential) to C-2 (Commercial) in order that the Appellant might legally continue to use the lot as a part of its parking lot adjunct to its general automobile sales and repair business located at 370 Windmill Road, Dartmouth.

The appeal came on for hearing at the appointed time and place. Service of the Notice of Appeal, the Notice of Hearing and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board.

All parties present at the hearing agreed that, as a dissatisfied Applicant, the Appellant had a right of appeal and that the Board had jurisdiction to hear the appeal within the meaning of Section 63(1)(b) of the Planning Act being c. 9 S.N.S. 1983. The Board accordingly assumed jurisdiction to hear this appeal.

Windmill Road in the City of Dartmouth runs approximately North and South approximately parallel, and quite close, to Halifax Harbour on its West. Ferguson Road intersects Windmill Road and runs one block West therefrom where it intersects Tidewater Lane which runs North one short block. Ferguson Road and Windmill Road form an "L". 3 Ferguson Road and its adjoining lot together make up an area of only 5000 square feet on the South side of Ferguson Road and together make up a corner lot on Windmill Road. They are now in use as a parking lot for the Appellant's automobile sales business. The rest of the South side of Ferguson Road is fully occupied by about five residences set on smaller but conventional building lots. The West side of Tidewater Lane is likewise fully built up in about three such residences. The opposite side of Tidewater Lane (and about 1/2 of the North side of Ferguson Road) is occupied by a large steel clad commercial building and the rest of the North side of Ferguson Road is occupied by the commercial use of a multi-storey Inn called the Concord Inn which fronts on the West side of Windmill Road. Thus one side of the "L" made by the intersection of these two roads is totally occupied as commercial.

The residences fronting on the West side of Tidewater Lane seem to back on the main C.N.R. track (at this point near the Narrows of Halifax Harbour) which runs close to and along the general course of the East side of the Harbour. The residences fronting on the South side of Ferguson Road appear to back on the Shaw brickyard and other properties having an Industrial use and they face the commercial uses across the street.

3 Ferguson Road has a commercial use on its South boundary. On its East is a commercially zoned lot facing Windmill Road owned also by the Appellant. On its West boundary is the lot and residential dwelling owned by the witness Wilfred Ferguson. The subject lot contains slightly over 2000 square feet. The Appellant's adjacent lot contains approximately 3000 square feet so the two lots, if joined together would contain over 5000 square feet and would form a corner lot on the South West corner of Windmill Road and Ferguson Road. They are now used, in that configuration, by the Appellant as a parking and display lot for its new car dealership, the main office of which is located opposite these lots on the East side of Windmill Road. Most of these locations are graphically shown on a plan "EXISTING LAND USE" being a portion of Exhibit H-5. 3 Ferguson Road is currently zoned R-2 which allows a low density residential use and the Appellant seeks to rezone it to C-2, a commercial zoning, which will legalize its present use by the Appellant as part of its parking lot.

Mr. Dickie and Mr. Moreash both addressed opening remarks to the Board.

Mr. Glenn L. Esperance, Development Officer of the City, was qualified by the Board with consent of the City counsel as a planner entitled to give expert opinion evidence concerning planning matters as they affect the City. He explained that the City had purchased the lot at the South West corner of Windmill Road and Ferguson Road and had used a portion of that lot (which is zoned commercial) for the purposes of widening Windmill Road. The City was left, after the road widening, with an undersized residual lot of no further use to the City, and of logical marketable use only to the owners of the land to the south of it or to the owners of the lands to the West of it. The City sold the residual lot on the corner of Windmill Road and Ferguson Road to the owner of 3 Ferguson Road who in turn, according to Mr. L'Esperance sold both lots to the Appellant. The Appellant then began to use both lots as a parking lot and applied to the City to have 3 Ferguson Road rezoned to C-2 which would permit the Appellant's continued use of 3 Ferguson Road as a parking lot for its new car business.

Mr. L'Esperance said that the City's planning staff under his direction, in the usual manner it handles applications to rezone, processed this application to rezone and made a recommendation to Council that the rezoning be granted which recommendation is contained in Exhibit H-5. Planning Staff's view was that the proposed commercial use for 3 Ferguson Road was a perfectly reasonable use and was not in conflict with any of the policies of the Municipal Planning Strateg

(MPS) and that the amendment sought by the Appellant to the Land-use By-law should be granted. He stated that the Generalized Land-use Map of the City shows the area adjacent to Windmill Road (which includes 3 Ferguson Road) to be designated for commercial purposes. Given this designation, he was and is of the opinion that the proposal is well within the intent of the MPS.

From the report to Council of October 1, 1985, he read:

> " The land use adjacent to the parcel of land to be rezoned includes commercial and residential. The generalized land use map of the Municipal Planning Strategy designates the general area as commercial.
>
> The request is not in conflict with the policies and intent of the Municipal Planning Strategy.
>
> The Planning Department, therefore, recommends in favour of the proposed amendment to the Land-use By-law."

Mr. L'Esperance noted that on March 4, 1986 an alternative to the requested rezoning was being sought which would be satisfactory both to the applicant and to the protesting neighbours. A development agreement was suggested as such an alternative solution but at that time the MPS would not allow a suitable development agreement and Mr. L'Esperance, at that time, felt that if Council so decided it would take about six months to make the necessary changes in the MPS to facilitate the Appellant's proposal by way of a development agreement. At the hearing, Mr. L'Esperance testified that the necessary changes to the MPS were no nearer to fruition as far as was necessary to accommodate the Appellant's needs and that at least another six months would pass before a change could be made in the MPS permitting the entering into of a development agreement to accomplish the proposal of the Appellant.

Mr. L'Esperance also read from a letter of December 10, 1985 (a portion of Exhibit H-4) from Patricia Richards, Planning Technician, reporting to Council the consensus of a public information meeting on this rezoning application held December 4, 1985.

> " Concerns were expressed over the possibility of the property being used for other uses rather than a parking lot. It was felt that the property should remain zoned Residential and the parking lot be allowed to continue to be allowed. There was also a suggestion that the property be contract zoned to allow only for a parking lot. It was explained that if the property remains as a parking lot, it would have to be zoned Commercial."

When asked whether the decision of Council in his opinion reasonably reflected the intention of the MPS, he referred back to the report (quoted in part above) where he said the proposal was not in conflict with the MPS. Under further questioning he said that it would be a "safe assumption" that in his opinion the decision of Council does not reasonably conform to the intent of the MPS.

On cross-examination, Mr. L'Esperance noted that the "Commercial [red] swath" in the General Land-use Plan along Windmill Road permitted residential use (and hence Zoning) as well as the commercial use proposed by the Appellant. He was directed to other similar "residential enclaves" within the "commercial swath" and conceded that several similar enclaves existed between Windmill Road and the Harbour within that swath.

He stated that the "red strip was intended to be commercial, basically oriented to Windmill Road." Mr. L'Esperance felt the "red strip" had existed since "the time of Amalgamation (circa 1961)" when it had been an actual commercial zone a maximum of 200' in depth on each side of the center line of Windmill Road. He felt the "swath" was intended to provide "a flexible situation" along Windmill Road. Mr. L'Esperance said it has been the position of the Planning Department (in which he is a senior and responsible person) for a number of years now that those enclaves are, by virtue of the fact that they are surrounded by the "very busy Halifax Harbour, heavy industrial rail line, L.E. Shaw brick plant, Nova Scotia Power Corporation thermal generating plant and other commercial uses in that area destined eventually to be put to other than their present residential use. It has always been our opinion that eventually these properties will be acquired by [buyers for use as] industrial and commercial purposes and eventually be replaced by those kind of uses." He said the last time this was publicly mentioned the local residents were opposed to "this kind of thing" and probably rightfully so as the communities in question were properly maintained and refurbished as necessary. The visible state of the communities concerned show that the residential home owners in those communities have an obvious pride of ownership. Nevertheless, according to Mr. L'Esperance, the general planning opinion is that industry and commerce will eventually take over "those small pockets." He stated that this view was the firm opinion of the planners but this view was not reflected in so many words anywhere in the MPS. Mr. L'Esperance commented on (C)2 and (C)3 zones of the Land-use By-law section of the MPS found on Page 60 of Exhibit H-2 and said, as to the buffering requirements therein contained, that the proposed parking lot would eventually require under the City zoning By-Law opague 6' fencing to serve as an appropriate buffer for the residential lot next door. He referred to the Land-use By-law (Exhibit H-3) at p.14 and p.15, s.15(i) which says:

> "Where commercial or industrial parking areas abut existing or proposed residential uses, such commercial or industrial parking areas shall be screened by landscaped buffers, fences or combinations thereof;"

as a control sufficient to meet the MPS requirement that the Council in considering a rezoning have due regard for buffering the adjacent residential use.

Mr. L'Esperance stated that the rezoning requested followed by a lot consolidation process would allow an imcompatible commercial use (e.g. a fast food outlet) next to Wilfred Ferguson's house at 5 Ferguson Road and a mere 7' from his house. He also stated that even without the proposed rezoning such an unfortunate event could now occur, as of right, a mere 37' from Mr. Ferguson's residence. Mr. L'Esperance feels that development agreements are more suitable than rezonings when dealing with "sensitive areas" which require maximum controls to ensure the minimum of conflict of uses which may occur when Council grants approvel to some proposal. If the development agreement avenue were open for this proposal it would be a more suitable vehicle to accomplish all the objectives of all concerned in the approval process for this proposal. The development agreement approach is not yet available because Council has not yet made it available.

Mr. L'Esperance was not prepared to see the consolidated lot at the South West corner of Windmill Road and Ferguson Road left undeveloped. For it to be developed it had to be developed as either a residential use (basically single family because of the size of the consolidated lot) or a commercial use. He feels that in the context of the entire area having a special regard to the commercial development of Windmill Road and its heavy traffic use that residential development would be a totally incompatible use and a much less appropriate use of the land than the commercial use to which the consolidated lot is now being put.

Mr. L'Esperance feels that the character of this neighbourhood is entirely different when confronted with a new commercial use through a rezoning than it would be in another neighbourhood that has an entirely residential character without any abutting collector road system like Windmill Road. Mr. L'Esperance cited several successful examples of co-existing residential and adjacent commercial fast food uses in the City and from that he deduced that such mixtures were not necessarily incompatible.

Mr. L'Esperance feels that the word "adjacent" as found in the MPS requirements on the factors to be reviewed by Council when it is considering a rezoning has a broader meaning than having a regard for the house next door alone. He holds the opinion that that word includes the house next door but also includes the concept of a larger nearby neighbourhood which is to be considered by Council as a whole - not just one small part. In the opinion of Mr. L'Esperance, Council had to consider in this rezoning that the uses in the general area of Ferguson Road and Windmill Road are for the most part commercial whether zoned commercial or only existing commercial. "That neighbourhood for the most part is commercial" Mr. L'Esperance regards this rezoning as trimming up of the original commercial zoning abutting on Windmill Road and is desirable for that reason as well. He feels that the zoning boundary as it now encompasses 3 Ferguson Road is an anomaly which the rezoning will productively remove.

Mr. L'Esperance agreed that the housing policies of the MPS supported the objectives to make full use of existing housing stock, to make sure there is sufficient suitable housing stock in the City, and that the dilapidated houses and neighbourhood areas be rehabilitated.

Mr. Moreash then called his two witnesses. Wilfred Ferguson, a long term resident of Ferguson Road, enumerated the improvements he had made to his home and the improvements he intended to make. Mr. Adair Stewart bought his house, on Ferguson Road, some 18 months ago and has spent considerable of his own labour and some $3,500.00 on home improvement materials which he has applied to his house. Both these witnesses proved the summary of Patricia Richards mentioned previously in this decision was an accurate summary of the views of the neighbours to the intended rezoning and it accurately summarized the present views of the two witnesses.

Alderman John Woods, unrepresented by counsel, appeared on his own and gave evidence under the aegis of s.27(3) of the Municipal Board Act. He is an alderman of the City elected for Ward V, the Ward in which 3 Ferguson Road is situate. He is a member of the MPS Review Committee, and is a member of the Ward V Social Action Committee. He is an engineer by profession. He recommended certain areas to be visited in the Board's planned view of the site which advice the Board followed. He disagreed with Mr. L'Esperance's view of the eventual disappearance of the residential enclaves in the area between Windmill Road and the Harbour. He said these areas are quiet, well treed, well kept and improving and are good places for people to live. There is very little traffic on all those streets. Alderman Woods opposes the increased commercial development on Windmill Road in the "red swathed area." He said he was reflecting the views of his constituents when he stated that they were tired of the planning department deciding how and where they were going to live and in what neighbourhoods. He says that on all his committee meetings on the MPS Committee he has not heard "one industrial or commercial person" come forward and say that he wanted the "red swath" on Windmill Road to be all zoned commercial.

The resolution of this appeal is much simplified because there is virtually no dispute on the facts. The geography of the neighbourhood is as set out above and the view made it that more understandable. The houses on Ferguson Road and Tidewater Lane, although of an older vintage, are well maintained and the pride of ownership is reflected in the care that each home owner has taken with his home.

Mr. L'Esperance's statement that his department visualizes the eventual disappearance of these residential homes into industrial and commercial uses is not, as perceived by the Board, an improper statement of policy made by an overofficious bureaucracy, as Alderman Woods seemed to imply, but merely a recitation of the facts as they have unfolded over a period of time and what the Planners predict the trends will be for development in the future. For the stating of facts, or for the prediction of future, however wrong he might be, Mr. L'Esperance cannot really be faulted. As a planner he is paid to do just that to the best of his ability. The view confirms his recitation of the land-use history to date. Only the residents themselves can make his predictions wrong in the future. Left to themselves, economic pressures on the lands will probably fulfill Mr. L'Esperance's predictions.

The Board has a duty under s.63(3) of the Planning Act to determine whether the decision of Council reasonably carries out the intent of the MPS. Under s.63(5) of that Act the Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the MPS.

Mr. Moreash, for the City, says the Council directed itself to the proper sections of the MPS as it relates to the instant application and that they properly applied those sections and thus their decision can reasonably be said to carry out the intent of the MPS and the Board, therefore, cannot interfere with the decision of Council. He further states that the Board, in considering this appeal, must take the "worst case scenario" when contemplating the uses to which the rezoned lands may be put after a successful rezoning in gauging the conflict that may arise between the use of the rezoned lands and the residential use of the adjacent lands. He says "adjacent" means the lot next door. Mr. Dickie cites the expert Mr. L'Esperance's recommendation and opinions and argues that his proposal falls within the intent of the MPS and that Council's refusal therefore cannot reasonably be said to carry out that intent. The most directly relevant portions of the MPS as cited by Mr. Moreash may be found on p.60 of that document and read as follows:

> "(c) ZONING BY-LAW
>
> .... in considering zoning amendments...Council shall have regard to the following: ...
>
> (2) that the proposal is compatible with and consistent with adjacent uses and the existing development form in the area;
>
> (3) provisions for buffering landscaping screening, and access control to reduce potential incompatibilites with adjacent land uses and traffic arteries.

The proposal to be considered is the one made by the Appellant namely to rezone to allow it to use 3 Ferguson Road as C-2 for vehicle parking purposes for use in conjunction with its new car sales business conducted on nearby sites together with a future possibility that the two lots might be later sold as a single parcel for some other commercial use. The proposal is something put forward by the applicant and that is what Council, under the present wording of the MPS, must consider. These were the only items proven before this Board that the present Appellant had applied for. This opinion answers in the negative Mr. Moreash's "worst case scenario" argument flowing from the rezoning and certain subsequent hypothetical lot amalgamations. These "worst cases" were simply not before Council and therefore Council could not consider them and if Council did consider them then its decision did not reasonably carry out the intent of the MPS as it now stands.

All knowledgeable witnesses were happy with the present use the subject land was being put to by the Appellant. There is no buffering provided by the Appellant at the present time so the additional buffering required by the Zoning By-law cited supra following upon the rezoning can only be an improvement on the present situation which all persons directly affected find satisfactory already. Lack of compatability with adjacent uses, then, can be the only defect in the proposal before Council in the first instance and this Board on appeal, in the second instance. The Board sees no merit in the narrow definition of "adjacent" advocated. The neighbourhood or "L" described above is the smallest area in this appeal to qualify to be described as adjacent and that is at least 50% commercial before this rezoning and will essentially be 50% commercial if this rezoning is approved. When characterized as having a mixed residential and commercial "development form" then it follows that the subject rezoning is fully compatible as to "use bulk and scale of the proposal" of the adjacent uses. Even if Mr. Moreash were correct and Council (and subsequently this Board on appeal) could adopt his "worst case scenario", the Board holds the opinion that the Appellant's proposal nevertheless would reasonably carry out the intent of the MPS.

The City did not call any planning expert to rebut Mr. L'Esperance's evidence which was clear, informed and intact even after a skilled cross-examination. The Board is entitled to infer that there was probably no responsible expert in planning to rebut his testimony and that this inference reinforces the Board's view that it should adopt, as its own, Mr. L'Esperance's opinion expressed to Council that the Appellant's proposal fully conforms with the intent of the MPS and his later opinion expressed at this Appeal hearing that the refusal decision of Council does not reasonably carry out the intent of the MPS.

The proposed rezoning, is, in the view of the Board, in full compliance with the intent of the MPS. The rezoning refusal decision of Council cannot, in the opinion of the Board, reasonably be said to carry out the intent of the MPS.

Thus the Board hereby, pursuant to Section 63(4)(c) of of the Planning Act, allows the appeal and instructs the Council, as soon as may be, to amend the Land-use By-law by changing the zoning of the subject lot from its present zoning of R-2 to C-2 as applied for by the Appellant.

An Order to allow this appeal pursuant to Section 29 of the Municipal Board Act will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 29TH day of August, 1986.

RICHARD L. WELDON
Member

Astro Management Ltd. v. City of Halifax

PLANNING--CONTRACT ZONING--REFUSAL TO APPROVE DEVELOPMENT AGREEMENT TO PERMIT 51-UNIT APARTMENT BUILDING--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, SS. 72(2),(4),(5) --CITY OF HALIFAX MAINLAND AREA LAND-USE BY-LAW, S.66--CITY OF HALIFAX MAINLAND AREA MPS POLICIES 1.1, 1.2, 1.4, 1.4.1, 3.1, 3.2

This is an appeal from a decision of the Council of the City of Halifax refusing to approve a contract development to permit the construction of a 51-unit apartment building on the Herring Cove Road. The property is zoned R-2 (two-family dwelling zone), contains 79,425 sq. ft. and is subject to Schedule "D" of the Land-Use By-law. The area is within the Mainland Area Municipal Planning Strategy (MPS), and is covered by a draft Mainland South Secondary Planning Strategy. The latter document has not yet been approved by City Council and is not in force. Staff in both the City's Planning and Development Departments considered that the proposed development met the intent of the MPS.

HELD: The appeal is dismissed.

Council's approval of a development agreement is not mandatory. Detailed policy criteria against which to measure the proposed development for compliance with the MPS was absent for the Mainland South area at the time of Council's decision. Section 66 of the Mainland Area Land-Use By-law governing Schedule "D" lands provides that Council may approve a development agreement, but shall not approve a development inconsistent with the MPS. The "reasons for refusal" by Council were said to be those outlined in the Minutes of the Council meeting at which the issue was discussed. The Board does not consider the mandatory requirement of s. 72(2) of the Planning Act related to providing the applicant with reasons is met in this way. Some reasons can be derived from the Minutes. One reason is the possible imminent approval of a draft secondary planning strategy. This was an invalid element in Council's consideration. The applicant's right to have its proposed development considered only in the light of the current policy and regulatory framework seems self-evident. Another reason is the opposition of area residents. The concerns of area residents are a valid matter for Council's consideration. The matters over which residents expressed concern relate to some of the issues in Policies 1.2, 1.4 and 1.4.1 of the applicable MPS. Neither Policy 1.4 nor 1.4.1 are mandatory. Policy 1.4 relates to neighbourhood stability. The MPS considers this area predominantly unstable or "soft." Policy 1.4.1 is concerned with the scale of the neighbourhood. Stability and scale were both concerns implicit in the opposition of area residents. Stability appears to be in the eye of the beholder. Policy 1.2 is mandatory and requires Council to maintain the integrity of existing residential neighbourhoods "by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs and characteristics of the neighbourhood." The subject property has frontage on

Herring Cove Road, a designated Principle Street, but penetrates deeply into the existing residential neighbourhood formed by adjacent streets to the rear. The proposed paved, lighted, elevated parking lot for 57 cars together with a common area for the use of residents of a 51-unit apartment building appears to represent an intensity of land use differing from the present residential neighbourhood development pattern. The proposed development may relate to needs and characteristics of Herring Cove Road but the subject property spans two areas of different use characteristics. It does not relate to the needs and characteristics of the adjacent residential neighbourhood to the rear and therefore offends Policy 1.2. The Appellant has not discharged the onus on it to prove Council's decision cannot reasonably be said to be consistent with the intent of the MPS. The Board will not interfere with Council's decision.

Note

An application for leave to appeal was denied by the Appeal Division of the Supreme Court of Nova Scotia. (See Order of Mr. Justice Macdonald, dated December 3, 1986, S.C.A. 01708).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983 Ch. 9;

- and -

IN THE MATTER OF: An Appeal by Astro Management Limited from a decision of the Council of the City of Halifax made December 12, 1985 which refused to approve a development agreement to allow the construction of a 51-unit apartment building at 286-288 Herring Cove Road.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: ROBERT G. GRANT, LL.B. for the Appellant, Astro Management Limited

BARRY S. ALLEN, LL.B., for the City of Halifax.

DECISION

A hearing was held at the Expropriations Compensation Board Room, Suite 904, 1660 Hollis Street in Halifax on April 9, 1986 and the evening of April 10, 1986 on an appeal by Astro Management Limited from a decision by the Council of the City of Halifax made December 12, 1985 which refused to approve a contract development to permit the construction of a 51-unit apartment building at 286-288 Herring Cove Road. The Notice of Appeal (Exhibit A-1) was dated December 23, 1985 and received by the Board on the same date. The stated grounds of appeal are "that the decision of the City Council of the City of Halifax cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy, particularly as set out in Part II, Section II "Residential Environments." Service of the Notice of Appeal, the Notice of Hearing, and the advertising of the Notice of Hearing were all proven to the satisfaction of the Board. With the concurrence of the parties, the Board assumed jurisdiction to hear the appeal on the merits.

The subject property, Lot R-1, is irregular in shape fronting on the east side of the Herring Cove Road and extending east and northeasterly into a triangular-shaped area formed by Williams Lake Road on the south and Clovis Avenue on the north. Both Williams Lake Road and Clovis Avenue intersect with the Herring Cove Road and as well intersect with each other to the east of the subject property. The property is zoned R-2, two-family dwelling zone and is subject to Schedule "D" of the Land-use By-law. It is within the area covered by the draft Mainland South Secondary Planning Strategy which at the time of the hearing of this appeal had not yet been approved by City Council. The property is capable of being serviced by sewer and water which is available on the Herring Cove Road. Lot R-1 slopes quite steeply toward the rear of the property as it extends back from the Herring Cove Road. It is 79,425 square feet in size.

Counsel for the Appellant called four witnesses, Counsel for the City called one. Six area residents gave evidence on their own behalf.

Pyara Randhawa, President and a principle shareholder of Astro Management Limited, gave evidence on the nature of the land use in the neighbourhood of the subject property, the chronology of his attempts to develop it and his plans for the proposed 51-unit apartment building.

The subject Lot R-1 forms a part of the lands acquired between 1972 and 1975 as separate lots and later consolidated. As well as the subject property, 286-288 Herring Cove Road, Astro Management owns or owned Civic Numbers 284 and 290 Herring Cove Road, properties which are located adjacent and to the north and south respectively of the subject lot. Mr. Randhawa stated that 284 Herring Cove Road had been sold for $38,000.00 to the First Pentecostal Holiness Church of Halifax which is located at 268 Herring Cove Road adjacent to 284 Herring Cove Road. There was an existing duplex located on 284 Herring Cove Road, to which has been added a house previously located at Civic Number 288, a portion of the subject property. Civic Number 290, to the south of the subject lot has a duplex located on it. Mr. Randhawa stated his intention to sell this property, as well, to the Pentecostal Church for $60,000.00. In addition, his intention was to move the house currently located on the Civic Number 286 portion of the subject property to the rear of Civic Number 290 and re-roof it, for an additional consideration of $15,000.00. Mr. Randhawa estimated that the sale of the two existing houses and lot (Civic Number 284) to the Pentecostal Church resulted in a monthly loss of rental income to him of $2,600.00.

The proposed 51-unit apartment building represented a reduction from 72 in the number of rental units originally planned by Astro Management. Mr. Randhawa said that the apartment building would extend 190-200 feet to the rear of the property and would contain 27, 2-bedroom apartments, 21, 1-bedroom apartments and 3 bachelor apartments in a building consisting of 3 stories and a basement. There would be 51 parking spaces for tenants and 7-8 for visitors according to Mr. Randhawa, and the property would be fenced all around with a 6 foot high fence. While explaining the details of the proposed apartment building, Mr. Randhawa referred to Exhibit A-5, an undated site plan of the proposed development for 286-288 Herring Cove Road prepared by J.R. Bardell and Associates Limited. Mr. Randhawa acknowledged that Exhibit A-5 was not identical with the site plan which council saw and considered in coming to its decision.

Mr. Randhawa was confident that there was sufficient demand for rental units in the area of the subject property to support his proposed rents of $500.00 a month for a 2-bedroom apartment and $450.00 a month for a one-bedroom apartment. If Council's decision is not reversed, Mr. Randhawa stated that he will have lost the two rental units previously located at 286 and 288 Herring Cove Road and would be able to use the subject property only for the construction of 2 duplexes on the 130 foot frontage on Herring Cove Road. He felt that the balance of the property would not be economically viable for development by a cul-de-sac road. Mr. Randhawa felt that the R-3 zoning proposed in the draft

Mainland South Municipal Planning Strategy for the subject property would not be suitable for that piece of land. He concluded that the proposed development would affect only Herring Cove Road and that it would stabilize and finalize development of the whole parcel of land bounded by Herring Cove Road, Clovis Avenue and Williams Lake Road.

In cross-examination Mr. Randhawa agreed that with the exception of a senior citizens home located off Clovis Avenue, the Williams Lake Road and Clovis Avenue area was an older neighbourhood of generally single family homes in which the proposed apartment building would not be compatible if it were located at the rear of the subject property.

Mr. Randhawa acknowledged that the drop in elevation from the front (Herring Cove Road) to the rear of the property was roughly 20 feet which would require fill to ensure that the parking area at the rear of the lot was level. (This is at variance with the applicant's position as described in the staff report to Council). Surface water from the rear parking lot would not drain to the swampy area beyond he said, because of a requirement by the City that all storm water drainage must be to Herring Cove Road. Mr. Randhawa had already filled some part of the rear of the lot "because it was low".

Mr. Randhawa agreed that the proposed apartment building would not be feasible without the prior acquisition of a triangular shaped parcel of land (Parcel B" on Sketch 1 of the Site in the staff report contained in Exhibit A-8) which had been obtained from the Pentacostal Church in exchange for a parcel of similar size and shape adjacent to the east boundary of the lands of the Church. The changes of proposed building and parking location from those shown in Sketch 3 of the staff report to Exhibit A-5 (not seen by Council) involve a shift of the building closer to the south boundary of the property, allowing vehicular access only on the north side of the buiding, and a shift of some of the parking area from the south side of the building to relocate all tenant parking at the rear of the building. Mr. Randhawa agreed that the 35 foot height of the proposed building would be higher than the surrounding single family homes but he was not sure how much higher it would be.

Rev. Vincent Brufatto, Pastor of the adjacent Christian View (Pentacostal) Church for the previous 15 months, spoke in favour of the proposed apartment development. In his opinion based on his experience, there is a need for additional rental housing in the area. The current uses of the lot - occasional engine repairs and a destination for the disposal of junked cars - were not desireable he felt. A previous development proposal by the Appellant to construct a beverage room on the site would not be at all appropriate adjacent to the church in his opinion. Rev Brufatto felt the impact on the existing single family homes in the area of the proposed apartment building would not be adverse if the development were well managed and could enhance the area if it was comparable in appearance to the Canadian Tire Store property at the corner of Clovis Avenue and Herring Cove Road, adjacent to the Christian View Church.

In cross-examination, Rev. Brufatto agreed that the other properties owned by Mr. Randhawa had not been well maintained but he understood that the plans to move dwellings located on those properties to other lots was the principal reason for the lack of proper maintenance and he trusted that the City's regulatory powers could be invoked if necessary by the Church. He reconfirmed that he felt rental housing was desperately needed and in fact his church intended to use the houses purchased from the Appellant as low and medium income rental units to both satisfy an existing community need and to offset a large church debt.

James Bardell, President and majority shareholder of J.R. Bardell and Associates whose business is in management consulting and the development of residential subdivisions and developments, gave evidence on the constraints and potential of the subject property for the apartment development proposed. Mr. Bardell described the subject property as a lot 600 feet in depth with a 25' difference in elevation from front to rear including an 18 foot drop approximately halfway back towards the rear of the lot. Mr. Bardell said that there was no advantage to developing the whole property and that it was best and most economical to develop the front portion, as was proposed. He did not think the proposed development would affect the residential area on Clovis Avenue or Williams Lake Road and pointed out that the closest house to the proposed apartment building would be 150 feet away from it.

Commenting on the proposed layout shown on Exhibit A-5, Mr. Bardell said that the building as designed could only be located at the front of the lot and that there could be a driveway on the east side of the building but that it would be better and less expensive if located on the north side. A side benefit of a north side driveway location would be an "active" common area on the south side of the building benefitting from sun and buffered from traffic to and from the apartment parking area located at the rear (east) of the building.

Mr. Bardell stated that the subject property has 4 levels and would need terracing. There is a 5-6 foot drop from the front to the rear of the proposed building, the parking area would be 10 feet lower and the "passive" common area at the rear of the property beyond the parking area would be 5 feet lower again. All storm drainage from the rear of the parking area would go underground through catch basins to Herring Cove Road.

Mr. Bardell commented on Exhibit A-11, a set of 4 drawings prepared by his firm. The first is the same as Exhibit A-5, followed by two plans of the area showing the Proposed Zoning and the Generalized Future Land Use as set out in the mainland South Secondary Planning Strategy, updated to October 1985. The last plan in Exhibit A-11 is a sketch layout of a 9-lot subdivision showing 5 lots at the front of the subject property and 4 located at the rear, reached by a 50 foot wide cul-de-sac road. This last site plan indicates that according to the existing zoning (R-2) 18 units could be located on the property and according to the zoning proposed in the Mainland South Secondary Planning Strategy (R-2P four-unit dwelling) 36 residential units could be accommodated on the site. In Mr. Bardell's opinion, this last layout would be prohibitively expensive because of the cost of the 400 foot road over the length of the property and would only be viable if land could be subdivided off the rear of adjacent residential lots which front on Clovis Avenue and Williams Lake Road. In addition, Mr. Bardell felt that a nine-lot subdivision of the property would be more disturbing to the abutting property owners at the rear of the subject property because it would penetrate an area probably considered as a common recreation area by surrounding residents.

In cross-examination, Mr. Bardell stated that the proposed storm drainage system to Herring Cove Road would reduce the runoff in the central area (at the rear of the subject property) by 75% and that there was no need to fence the "passive" common area at the rear. In his opinion, a building 10-15% larger than that proposed would be disruptive to the neighbourhood and he agreed that any evaluation of an appropriate size for the proposed apartment building was subjective.

Bill Campbell, a staff member of the City's Development Department since 1981, was involved in discussions with the Appellant before his application for a development agreement was formally made. He had encouraged the reduction in the number of apartment units from 72 to 51. In his evidence he reviewed the history of previous applications for rezoning of this property to R-4 (in 1973 and 1977) and to C-1 (in 1973). All of these applications by the Appellant had been recommended for refusal by staff because of problems with storm sewers and with traffic on the Herring Cove Road, and because the site was ineligible for a Regional Development Permit due to a proposed alignment for Northwest Arm Drive. These problems, he said, had all been eliminated and staff had recommended approval of this most recent application, a position he personally endorsed.

In Mr. Campbell's opinion, the existing land use on Herring Cove Road in the area of the subject property was a mix of uses more intense than R-2. He believed that physical separation and buffering would lessen the impact of the proposed development on adjacent homes. Commenting on the variations proposed by the Appellant in the location of parking, driveways and recreation space, Mr. Campbell felt that realignment of all but the building would be possible and acceptable if it improved buffering and parking.

In cross-examination Mr. Campbell stated that the staff report considered both Herring Cove Road and the mainly single family development on Clovis Avenue and Williams Lake Road as neighbourhoods in considering the relevance of Municipal Planning Strategy (M.P.S.) Policy 1.2 to the proposed development on the subject property. Density of the proposed apartment building was not considered vis-a-vis the single family properties to the rear however. Policy 1.2 of Part II, Section II, "City wide objectives and Policies" in the M.P.S. states:

> "1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be

> related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

Mr. Campbell pointed out that the developer could have more than 51 units in the proposed apartment building and still be within the maximum R-4 (multiple dwelling zone) density which is the as-of-right control used by Staff as a guideline when considering a development agreement for an R-4 use. Mr. Campbell agreed that the subject property was a difficult site and conceded that the staff report to Council did not specifically refer to any such difficulties.

Counsel for the City called Robert Robertson, a Planner II with the City's Planning Department since 1981, who had been assigned to contribute comments for the Planning Department to the Development Department which was responsible for the preparation of the staff report to Council. He gave evidence on the compatibility of the proposed development to the policies of the M.P.S. Mr. Robertson supported the recommendation of the staff report which was that it would be consistent with the MPS to approve the proposed development agreement. Asked if Council's decision to refuse approval of the development agreement could be said to be inconsistent with the MPS, Mr. Robertson stated that the question was a difficult one to answer absolutely. He pointed out that the subject property is in an area designated as a "soft" area slated for neighbourhood planning. The area is covered by a Schedule in the MPS as an interim control measure, which he felt provided Council with a certain amount of discretion, on an interim basis, to decide what is or what is not in compliance with the MPS.

Mr. Robertson agreed that there were no policies in the MPS which encouraged the location of apartment buildings in the area of the subject property. He felt that since the area was intended to be subject to a detailed area plan - not yet completed and in place - Council did not have specific guidelines for development agreements which could result from a secondary planning strategy for Mainland South and so had more latitude in its decision making. Mr. Robertson agreed that the views of the neighbourhood, given the subject site which is located in a "soft area" in the process of developing a detailed area plan, would be particularly important.

In cross-examination Mr. Robertson stated that the proposed development was not inconsistent with the MPS in his opinion but that nothing compelled Council to approve the development agreement. He agreed that the subject property was a particularly difficult site and that R-2 development which was possible as-of-right could be worse than R-4 in its effects upon the neighbourhood. He agreed that the reasons given to the applicant for Council's refusal to approve the development agreement, as required by Section 72(2) of the Planning Act, made no reference to policies of the MPS. In fact, the "reasons for refusal" given to the applicant in a letter from the Acting City Clerk (Exhibit A-9) were simply an accompanying extract from the Minutes of the meeting of Council at which the decision was made.

In summary, Mr. Robertson repeated that in his opinion the proposed development met the intent of the MPS. Given the location of the subject property in a "soft area" without a secondary planning strategy yet in place, however, it was his opinion that the subjective test of compatibility with the MPS was more liberal, and that Council had more discretion in such a situation to decide whether the proposed development met the intent of the MPS. His conclusion was that Council's decision was "not completely inconsistent with the intent of the MPS".

The following area residents spoke in opposition to the proposed development and in support of Council's decision: Beulah Kemp-Meade, 17 Clovis Avenue; Bonnie Kirby, 23 Clovis Avenue; William Fripps, 19 Clovis Avenue; Marie Bell, 14 Williams Lake Road; Jim Bowie, 21 Clovis Avenue and Joan Anthony, 14 Williams Lake Road. Concerns were expressed about the existing swamp at the rear of these properties (and the rear of the subject property) and whether fill required for the proposed development would worsen the drainage problems experienced by surrounding area residents. Concern was expressed as well with the potential of trespassing by residents of the proposed development and with the ineffectiveness of any fencing around the subject property to deter such trespassing. Several residents had reservations about whether the insistence by City Staff that storm drainage from the subject property must be directed to Herring Cove Road could be achieved. Several residents whose land abuts the subject property were opposed to any fill from the subject property being placed on their properties.

In an appeal such as this, from a refusal of a Council to enter into a development agreement, the Board is governed by the following sections of the Planning Act:

> "72.4 The Board shall not interfere with the decision of the council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall
>
> (a) refer the matter back to the council; and
>
> (b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant.
>
> 72.5 A determination of the Board pursuant to subsection (4) shall contain reasons for the determination."

The Board has considered the evidence from the hearing and the argument presented in briefs submitted by Counsel for both the Appellant and the City. The Board as well has visited the site.

The Board agrees with Mr. Robertson, one of two expert planning witnesses who gave evidence, that Council's approval of a development agreement is not mandatory and that detailed policy criteria against which to measure a proposed development for compliance with the MPS was absent for the Mainland South area of the City at the time of Council's decision.

Section 66 of the Mainland Area Land-use By-law outlines the controls imposed by Schedule "D" which covers the Mainland South area of the City, as follows:

> "66 In any area shown as Schedule "D", any use shall be permitted which is permitted by the zoning designation of such area, provided that:
>
> (a) R-4 uses shall not be permitted;
>
> (b) C-1, C-2, I-1 and P uses shall not exceed 35 feet in height and shall not exceed 5,000 square feet in floor area;
>
> * (ba) No amusement centre shall be permitted (* Refer to #14 in Amendment Section)
>
> * (c) Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this Bylaw provided that no approval shall be given inconsistent with the Municipal Planning Strategy or Section 5 of this Bylaw; (*Refer to #10 in Amendment Section)
>
> (d) Approval by Council under Subsection (c) above shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

By Section 66(c) Council may approve a development agreement (or may not) limited only by the mandatory direction that Council shall not approve a development which is inconsistent with the MPS. There was consensus by the parties that the only relevant policies of the MPS against which Council could measure the consistency of the proposed development to the MPS were the following, contained in City wide objectives and Policies concerning Residential Environments:

> "1.1 Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services.
>
> 1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.
>
> . . . .
>
> 1.4 Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods.
>
> 1.4.1 Stability will be maintained by preserving the scale of the neighbourhood, routing future principal streets around rather than through them, and allowing commercial expansion within definite confines which will not conflict with the character or stability of the neighbourhood, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

With reference to Policy 1.1, the Staff Report to Council analyzed the capacity of the "existing or presently budgeted services" to handle the proposed development in accordance with Part III, Section I, Subsection 1.1, Land Development Distribution Strategy of the MPS which states:

> "2. The City not permit any development in Mainland South outside the immediate development area designated on the Regional Plan Map, Appendix "C", of the Halifax-Dartmouth Regional Development Plan, 1975; and that within the immediate development area where any development proposal requires Council permission or action, the City shall require an assessment of the proposal by staff with regard to the Statement of Objectives and Policies, the adopted Land Development Distribution Strategy;, and that such assessment include the potential impacts of the proposal on:

i) the sewer system (including the budgetary implications

ii) the water system

iii) the transportation system (including transit)

iv) existing public schools

v) existing recreation and community facilities

vi) the provision of police and fire protection services and any other matter deemed necessary by Council prior to any approval by City Council."

The analysis in the staff report of the impact of the proposed development on city services is as follows:

"i) Sewer System The sanitary and storm sewer systems can adequately handle this development. A storm sewer has been installed in the Herring Cove Road. This has been designed to handle all storm water within the Herring Cove Road drainage area. Staff is of the opinion that some filling of the site may be required for proper storm water drainage. The applicant advises that the existing contours will be used and no filling is to take place. If this application is approved by Council, a site services plan will be prepared by an engineer and submitted for staff approval prior to issuance of a building permit.

ii) Water System Adequate water can be supplied to this development by the existing system.

iii) Transportation The Herring Cove Road has been widened in this area as part of the overall road upgrading. Therefore, any additional traffic from this development should not have a negative effect on the Herring Cove Road. The traffic increase on the Rotary from a 51 unit building is considered minimal.

With respect to transit, the existing services can handle the anticipated increase in ridership from this proposal.

iv) Public Schools Schools in this area can readily accommodate any students who might reside in the proposed building.

v) Recreation and Community Facilities This area of the City is deficient in recreation opportunities. Hartlen Field is nearby but is presently overused. However, the recently constructed Mainland South Community Centre has

> provided a swimming pool plus improved community facilities for Mainland South.
>
> vi) Police and Fire Protection The Fire Department advises that this proposal does not present any potential negative impact on its existing services. The Police Department has not indicated that reduction in its level of service will result from this proposal. A suggestion has been made regarding lighting of the parking area.
>
> In conclusion, the proposed development can be accommodated by the existing services."

The staff report having examined the proposed development as required by Policy 1.1, considered the remaining relevant MPS policies as follows:

> " Policies 1.2, 1.4 and 1.4.1 require maintenance of existing neighbourhoods. Scale of development and compatibility between uses are to be considered.
>
> As noted earlier, this section of Herring Cove Road includes a variety of uses. The proposed building is not considered incompatible with the existing uses. The site also abuts on the low density areas along Williams Lake Road and Clovis Street. Buffering should be provided along the lot boundaries where the parking lot abuts the low density housing. A clause to this effect has been included in the draft contract.
>
> The matter of potential conflict with North West Arm Drive was resolved in 1979. At that time, staff of the City and Province agreed to a proposed alignment for North West Arm Drive from Old Sambro Road to a point past the built up area south of Williams Lake Road, therefore avoiding Lot R-1."

The report concludes with the recommendation that the development agreement in question be approved by City Council.

Staff in both the City's Planning Department and Development Department considered that the proposed development met the intent of the MPS. Council, however, is not required to approve a development agreement. The "reasons" given to the Applicant for

Council's refusal to approve the proposed development agreement can only be adduced from the extract of the Minutes of the Meeting of City Council at which the decision was taken. As pointed out by Counsel for the Appellant, the record of the debate on this matter does not mention the specifics of any MPS policies or the way in which the proposed development contravenes such policies.

In the Board's opinion, the "reasons for refusal" which can be derived from the extract of Council's Minutes would appear to be these:

1. Area residents were opposed.
2. The staff recommendation for approval was "premature" because the Mainland South Secondary Planning Strategy was about to go to Council for a public hearing (and possible approval).
3. The Mainland South Secondary Planning Strategy recommendation would not permit the proposed R-4 use in a R-2 zone.
4. There were errors or omissions in the Staff Report with regard to existing land use in the area of the subject property.
5. The proposed development would increase traffic entering Herring Cove Road during the morning rush hour.

The Board considers the matter of neighbourhood opposition and possible contravention of the draft Mainland South Secondary Planning Strategy to be the major issues of those mentioned in the Minutes.

Considering these issues in reverse order, the possible imminent approval of a draft secondary planning strategy which might not permit a development such as the one proposed is, in the opinion of the Board, an invalid element in Council's consideration of a development agreement which at the time of the application and of Council's decision was a legitimate proposal meeting the intent of the policies and regulations of the MPS and Land-use By-law in the opinion of qualified city staff. The applicant's right to have its proposed development considered only in the light of the current policy and regulatory framework seems self-evident.

The concerns of area residents, on the other hand, are a valid matter for Council's consideration in deciding to approve or reject a development agreement. The principle concerns expressed at the Board's hearing were the existing and future drainage problems at the rear of both the subject property and the rear of properties fronting on Clovis Avenue and Williams Lake Road; the height of a 35 foot apartment building given the existing 20 foot elevation at the highest part of the subject property above the swampy area at the rear; the possibility of trespass, noise and nuisance from the apartment building given the central location of the subject property and the extent of its common boundaries with existing residential properties; and the viability of storm drainage from the subject property being routed to Herring Cove Road. The area residents expressing these concerns did not relate them to specific policies in the MPS. These matters do however, relate to some of the issues in Policies 1.2, 1.4 and 1.4.1 previously cited.

Policy 1.2 requires that the integrity of existing residential neighbourhoods (in this case, primarily Clovis Avenue and Williams Lake Road) shall be maintained by requiring that any new development which would differ in ..... intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood. This is to be accomplished by Implementation Policies 3.1 and 3.2 as appropriate. Section 3.2 provides for development control regulations (contained in land-use by-law schedules) for areas slated for detailed planning. Given the topography, size and location of the subject property in relation to the surrounding properties,it would be difficult to visualize any development which would not affect in some way the existing residences. The neighbourhood of these two streets is residential in character, though mainly low-density. The proposed residential development is not related to the low-density character of that neighbourhood although the most intense use is proposed to be farthest away from homes on lots fronting on Clovis Avenue and Williams Lake Road. The degree to which it affects the integrity of that neighbourhood is the degree to which it violates Policy 1.2 of the MPS. Council's "reasons for refusal" mention no concern with maintenance of the integrity of the low-density residential neighbourhood of Clovis Avenue and Williams Lake Road.

Policy 1.4 speaks of diversity of residential neighbourhoods, the encouraging of retention of the existing residential character of predominantly stable neighbourhoods and of controlling change to be compatible with such neighbourhoods. Although some area residents who gave evidence have lived for many years on Clovis Avenue or Williams Lake Road, the area of the City of which this is a part (Mainland South) is considered in the MPS to be predominantly unstable or "soft" and hence in need of detailed planning. It was not contested that Herring Cove Road between Clovis Avenue and Williams Lake Road has a mix of commercial and institutional uses although there still remain some remnants of low density residential uses. Council's "reasons for refusal" mention no concern with the preservation of a stable neighbourhood. Planning staff expressed the view that the proposed development agreement would be compatible with the low density existing residential neighbourhood located on Clovis Avenue and Williams Lake Road because of the placement of the apartment building closest to Herring Cove Road and because of the provision for buffering of the parking area at the rear.

Policy 1.4.1 is concerned with the preservation of the scale of the neighbourhood, the routing of future principal streets around rather than through residential neighbourhoods and the limiting of commercial expansion to avoid conflict with the character or stability of the neighbourhood. The Policy expresses an intent rather than a mandatory direction. Neither the alignment of future principal streets nor commercial expansion are relevant to this proposed development. The maintenance of the neighbourhood stability and the preservation of the scale of the neighbourhood were both concerns implicit in the opposition expressed by area residents.

Stability appears to be in the eye of the beholder: the majority of the area residents who spoke in opposition to the proposed development considered their neighbourhood to be stable and considered their neighbourhood to be Clovis Avenue and

Williams Lake Road. Changes in land-use and intensity of use along the Herring Cove Road did not appear to have substantially affected their perception of their neighbourhood stability. The City however, has designated this area as predominantly unstable. Because mainland South, a sizeable area of the city has been designated unstable and in need of detailed planning, should it be ineligible for the preservation of its scale?

Of the MPS policies discussed in detail above (Policies 1.2, 1.4 and 1.4.1) only Policy 1.2 is worded to express a mandatory direction for Council. It requires Council to maintain the integrity of existing residential neighbourhoods "by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs and characteristics of the neighbourhood". Was Council's decision to refuse approval for a development agreement to allow a 51-unit apartment building at 286-88 Herring Cove Road consistent with this policy of the MPS?

The subject property has frontage on Herring Cove Road but penetrates deeply into the existing residential neighbourhood of Clovis Avenue and Williams Lake Road. Approximately two-thirds of the lot area of the subject property would be used for the proposed 35 foot high apartment building and ancillary paved parking lot for approximately 57 cars. The proposed apartment building fronting on Herring Cove Road would be at an elevation 20 feet higher than the predominantely single family neighbourhood to the rear. The parking lot behind it would slope gradually down toward the level of the low swampy area at the rear and to either side of the subject property, culminating in a passive common area of undetermined elevation depicted on Exhibit A-5 as a grassed area surrounded by trees. A paved, lighted, elevated parking lot for 57 cars together with a common area for the use of the residents of a 51-unit apartment building appears to represent an intensity of land use differing from the present residential neighbourhood development pattern of Clovis Avenue and Williams Lake Road.

The subject property spans two areas with different land use characteristics, having frontage on a designated Principal Street (M.P.S. Generalized Future Land Use, Map 9) characterized by mixed commercial, institutional and residential uses, and being part of a low-density existing residential neighbourhood to the rear. In the opinion of the Board the proposed development may relate to needs and characteristics of the Herring Cove Road but its proposed intensity of use does not relate to the needs or characteristics of the residential neighbourhood of Clovis Avenue and Williams Lake Road and therefore offends the provisions of Policy 1.2 of the Part II, Section II City-Wide Objectives and Policies, Residential Environments of the Municipal Planning Strategy.

The Appellant has not discharged the onus on it to prove that the Council's decision to refuse to approve a development agreement cannot reasonably be said to be consistent with the intent of the MPS. The Board will not interfere with the decision of Council to refuse to enter into a development agreement for property at 286-288 Herring Cove Road to permit the construction of a 51-unit apartment building.

The Board notes in passing, Section 72(2) of the Act which states, "A decision of the Council....[to refuse to enter into an agreement] shall provide the applicant with the reasons for the decision." The Board does not consider that this mandatory requirement has been met merely by supplying the applicant with an extract from the Minutes of a meeting of Council at which the decision was made, accompanied by a statement that the reasons for Council's refusal are "outlined" in the extract of the Minutes.

For the reasons previously stated, the appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of October, A.D., 1986.

E A Salton

ELIZABETH SALTON
Vice-Chairman

Schuurkamp v. Town of North Sydney

PLANNING--DEVELOPMENT PERMIT--REFUSAL TO PERMIT A PROTOTYPE FACILITY FOR FISH MARINATION--WHETHER INCONSISTENT WITH LAND-USE BY-LAW--PLANNING ACT, SS. 78(1),(3)--TOWN OF NORTH SYDNEY LAND-USE BY-LAW, PART 1, S. 25; PART 7, S. 1; PART 14

This is an appeal from a decision of the development officer for the Town of North Sydney refusing to issue a development permit for the construction of a prototype facility for fish marination on the Appellant's property on Union Street. The lot is approx. 45 ft. by 100 ft., is zoned C-2 and contains a dwelling house and garage. The Appellant seeks approval to construct a 20 ft. by 24 ft. building on the northern portion of his land. This area of the Town is zoned C-2 although existing uses are varied, with some residential and some commercial uses. The Town has a Municipal Planning Strategy (MPS).

HELD: The decision of the development officer is confirmed. The appeal is dismissed.

Under s. 78(3) of the Planning Act, the Board has two options open to it, namely, to (a) confirm the decision or to (b) allow the appeal by ordering that the permit be granted "but no permit shall be granted that is inconsistent with the Land-Use By-law." The Appellant's proposed use is not one that is permitted under the General Commercial (C-2) Zone of the Town's Land-Use By-law. Allowable uses in the C-2 Zone include uses permitted in R-2 and C-1 Zones,but none of these uses includes the processing of fish. The proposed fish processing use also does not come within the definition of "Home Occupation" business uses allowed in residential zones. Much evidence was directed to whether the proposed use would be "obnoxious" and so be inconsistent with Part 7, Section 1, Proviso (i) of the Land-Use By-law. The Board is unable to conclude from the evidence that the use would be obnoxious. The proposed use could be carried on in M-2 and M-3 Zones under the Land-Use By-law. The permit applied for is inconsistent with the Land-Use By-law.

NSMB-497-85-P

NOVA SCOTA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, c. 9 Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by **GERRIT SCHUURKAMP** from the decision of Brian Spicer, Development Officer for the Town of North Sydney, made on August 29, 1985, refusing to issue a development permit.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: WILLIAM P. BURCHELL, LL.B., for the Appellant, Gerrit Schuurkamp;

BRIAN SPICER, the Development Officer for the Town of North Sydney, appeared on his own behalf.

DECISION

This is an appeal under Section 78 s.s.(1) of the Planning Act, 1983, Statutes of Nova Scotia, c. 9, by **GERRIT SCHUURKAMP** of North Sydney, from the decision of Brian Spicer, Development Officer, for the Town of North Sydney, made on August 29, 1985, refusing to issue a development permit for the construction of a prototype facility for fish marination on the Appellant's property known as No. 8 Union Street, in the Town of North Sydney.

The property in question is situate on the corner formed by the West side of Union Street and the South side of George Street Extension. It is approximately 45' x 100' and there is located on it the Appellant's dwelling house approximately 30' x 40' and a 12' x 24' garage. The property is zoned commercial (C-2) and is in an area zoned C-2 although there is a mix of commercial and residential uses in the neighbourhood of the subject property. Union Street is four short blocks in length and extends from Commercial Street on the South to Pleasant Street on the North. Commercial Street is the main business thoroughfare in the Town and extends along the waterfront.

The Appellant retained A. Peter Ross, Barrister of Sydney, who wrote to the Board by letter dated September 12, 1985, and received by the Board on September 13, 1985, advising that he represented the Appellant "who wishes to appeal the decision of Mr. Brian Spicer, Development Officer, denying his application for a building/development permit for a fish marination facility adjoining his residence on Union Street, North Sydney". This letter states that "Mr. Spicer was to-day advised by telephone of Mr. Schuurkamp's intention to appeal".

The Board wrote to Mr. Ross on September 16, 1985 instructing him to file within 14 days from September 13, 1985, an Amended Notice of Appeal as the letter of September 12, 1985, did not "precisely conform to the requirements of the Board's Rules of Practice and Procedure". The letter of September 12, 1985, did not include an undertaking to pay the cost of advertising the Notice of Hearing as is required under Section 5(1) of the Board's Rules.

On September 27, 1985, the Board received a letter from Mr. Ross enclosing an Amended Notice of Appeal dated September

25, 1985, and an undertaking to pay the costs of advertising the Notice of Hearing, all in accordance with the Board's Rules of Practice and Procedure for Appeals Under the Planning Act.

The Amended Notice of Appeal was filed as Exhibit S-1 and was signed by A. Peter Ross as Solicitor for the Appellant.

The grounds of appeal as set out in the Notice of Appeal are as follows:

> "(a) That the proposed facility should have been considered an allowable use in the relevant zone (C-2);
>
> (b) That the proposed facility should have been allowed under part 7 of the Town by-law and other relevant sections as a business use permitted in the particular zone, or a Home Occupation as defined in the by-law, in that the development officer misinterpreted the facts and data supplied to him by the Appellant, and/or misinterpreted the criteria specified for Home Occupation or allowable business use. In particular, the Appellant states that the proposed use should not have been deemed 'obnoxious' within the meaning of the by-law, considering the quantities of fish involved, the proposed method for processing the fish, the Appellant's intention to maintain the utmost standards of sanitation, and the proximity of the site to other fish processing facilities within the Town."

The Board set the appeal for hearing in North Sydney for Thursday, November 21, 1985, and the Clerk of the Board by letter dated October 22, 1985, instructed the Appellant's solicitor, Mr. Ross as to the names of those persons who were to be served with a copy of the Notice of Hearing which was prepared by the Board. The Clerk of the Board arranged to have the Notice of Hearing advertised in the Cape Breton Post by three insertions appearing on October 31, 1985, November

7, 1985 and November 14, 1985.

On November 19, 1985, the Board received a letter from A. Peter Ross advising the Board that he will not be representing the Appellant at the hearing of the appeal and that William P. Burchell, Barrister, had been retained by the Appellant for this purpose.

On November 21, 1985, the Board Chairman attended at the Council Chambers in the Town of North Sydney to hear the appeal. In attendance were William P. Burchell, Barrister, representing the Appellant, Glen MacDougall, Barrister, representing the Development Officer, Mr. Brian Spicer, the Development Officer and a number of residents from the neighbourhood in which the subject property is situate.

Mr. Burchell tendered the Affidavit of Sherry Colleen Cameron filed as Exhibit S-2 in proof of the Board's requirements as to service of the Notice of Hearing scheduled for November 21, 1985. He then requested that the hearing of the appeal be adjourned due to the fact that he had not had time to prepare the case for the Appellant because of personal illness.

The Board asked if any persons present on November 21, 1985, wished to be heard on the motion for adjournment. The following persons expressed their opposition to the motion for adjournment, namely:

William Dicks - 9 Union Street;
William Finney - 7 Union Street
Joseph MacDougall - 6 Summer Street;
Joseph D. Rahey, a Town Councillor.

Although Counsel for the Appellant could have telephoned the Board prior to the hearing scheduled for November 21, 1985, and requested the adjournment or could have written a letter to the Board for the same purpose, this was not done. Such a procedure would have resulted in an adjournment and saved the Board the time and expense of a trip to North Sydney on November 21, 1985. It would also have saved those area residents who attended on November 21, 1985, the time and effort of attending a hearing where the real issue was not considered. The Board in the circumstances granted the adjournment which was necessitated through no fault of the Appellant. The hearing was adjourned to December 19, 1985, in order to allow the Appellant's solicitor sufficient time to prepare for the case.

The Board advertised a Notice in the Cape Breton Post dated November 27, 1985, indicating that the hearing scheduled for November 21, 1985, had been adjourned to December 19, 1985. At the request of the Appellant's solicitor, the hearing scheduled for December 19, 1985, was adjourned without day. On February 13, 1986, the Board received a letter from the office of the Appellant's solicitor stating that "Mr. Burchell is away from the office and will not be returning until sometime in March. Accordingly, I would ask that the Appeal be set down for sometime in the Spring...". On March 21, 1986, the Board received a letter from Glen C. McDougall, Barrister of Sydney, Solicitor for the Cape Breton Metro Planning Commission, stating inter alia that "there is no objection to the Appellant's request for an adjournment until some time during the months of July or August."

The Board then set the appeal for hearing for July

28, 1986, after consulting with the Appellant's solicitor and Glen McDougall, Solicitor for the Development Officer. The Clerk of the Board then mailed instructions to the Appellant's solicitor to serve Notice of the Hearing scheduled for July 28, 1986, on certain named persons. The Board also requested the Cape Breton Post to publish Notice of the Hearing scheduled for July 28, 1986, by one insertion on July 21, 1986.

The hearing scheduled for August 28, 1986, was held in the Town Council Chambers in North Sydney. Mr. Burchell tendered his Affidavit of Service of the Notice of Hearing filed as Exhibit S-3. Mr. Spicer, the Development Officer appeared on his own behalf and had with him Malcolm Gillis, a planner employed by the Cape Breton Metro Planning Commission. Twenty-two exhibits were filed with the Board including two which were filed when the hearing commenced on November 21, 1985.

The application for the development permit was made by the Appellant, Gerrit Schuurkamp, the owner of a business known as Schuurkamp Smokers Inc. The application is dated June 27, 1985, and states that the "purpose of permit/s is for the prototype marination process, and for storage of related materials i.e. bottles, cartons etc." A photocopy of this application was filed as Exhibit S-15. No dimensions of the proposed building were given on the application. Another computerized but unsigned version of the application was filed as Exhibit S-7. This latter application referred to the proposed use as an "Accessory Building (20 x 42) for prototype marination process" and gave an estimate of value in the amount of $45,000.

The Town of North Sydney has in effect a Municipal Planning Strategy (MPS) adopted by the Town Council on May 6, 1982, and approved by the Minister of Municipal Affairs on July 23, 1982, a copy of which was filed as Exhibit S-5. A copy of the Town's Land-Use By-law approved by the Minister of Municipal Affairs on the same date was filed as Exhibit S-6.

The decision of Brian Spicer, the Development Officer in refusing to issue a development permit to the Appellant is set out in a letter from Mr. Spicer to the Appellant dated August 29, 1985, a copy of which was filed as Exhibit S-8. This decision reads as follows:

> "After very careful consideration, I have determined that your proposal is inconsistant with the Land Use By-law for the Town of North Sydney. In this regard, your permit application has been refused and we've enclosed herewith our refund cheque in the amount of $17.00, less $5.00 processing fees.
>
> The following are my reasons for this decision:
>
> 1) The property in question is located in a C-2 zone which through reference allows all uses in R-2 and C-1 zones. However, nowhere in these zonings is there a listing for a processing operation nor is there any use listed which could be considered similar.
>
> 2) Next we considered the use as a Home Occupation which is defined as 'a professional office, arts and crafts workshop or personal services shop'. Of these uses the only one that could possibly be considered would be that of an arts and craft workshop.
>
> 3) The definition of an arts and craft workshop is 'a building or part of a building used by a craftsman, craft or guild for the manufacture of goods in small quantities'. The most relevant part of this definition

> for your application are the words 'small quantities'. From our telephone conversation of last week I've calculated that if you were to process fish one day a week you will handle over 1,000 lbs. of fish per day. This may not be considered a small quantity.
>
> 4) As well, under the provisions of Part 7, Section 1, Subsection D, your building is not to have a floor area greater than 500 sq. ft. and your application indicates an area of 840 sq. ft.
>
> 5) Lastly and possibly most important is Subsection (i) which deals with the operation and it's obnoxious odour. Given the fact that you intend to handle 1,000 lbs. of fish per day, it is my opinion that it would be difficult, if not impossible, to carry out this operation in most areas of the Town without creating an obnoxious odour.
>
> I must also advise you that it is your right to appeal this decision within fifteen (15) days to the Nova Scotia Municipal Board. Should you need assistance in doing this or if you wish a further explanation, please feel free to call."

Evidence on behalf of the Appellant was given by John Schuurkamp, a son of the Appellant, and by the Appellant himself. Evidence was given by the Development Officer, Brian Spicer after being called by the Board to testify. Gordon McDougall, William Finney, Cecil Green, William Dicks and Ada Green all of whom supported the decision of the Development Officer also testified.

John Schuurkamp, son of the Appellant gave evidence on behalf of the Appellant. He resides at No. 8 Union Street and is associated with his father, Gerrit Schuurkamp in the proposal to establish a fish marination processing plant in a building to be constructed on Union Street on the same parcel of land where the dwelling house of the Appellant is located. He outlined in some detail his father's previous efforts in trying to establish his plant on Queen Street in the Town of

North Sydney. Mr. Schuurkamp explained that initially his father had applied to the town in February 1985 for assistance in acquiring land on Queen Street in the Town adjacent to a parcel of land owned by his father. His father at that time had intentions of establishing a plant on Queen Street. This resulted in a meeting with the Town Council on April 30, 1985 when the Appellant was informed that the Town was unable to assist the Appellant to establish his plant on Queen Street as the property the Appellant was interested in was owned by National Sea. Mr. Schuurkamp identified a marketing and financial feasibility report dated September 5, 1985, which had been prepared by Thorne Riddell a copy of which is filed as Exhibit S-9. He stated that this study confirmed the viability of the proposed operation on Queen Street.

The feasibility report outlines "the proposed development of a secondary fish processing facility to manufacture smoked and marinated fish products". According to the report this facility was to have been constructed in the Sydport Industrial Park at Point Edward. The report stated that two major product lines would be produced, namely, smoked fish and marinated fish. Production was projected with raw material requirements of 212.5 tonnes for smoked products and 17 tonnes for marinated products during the first year of operation. Although the report was admitted in evidence it has little relevance to the issue in question, namely, the refusal of the Development Officer to issue a development permit with respect to property on Union Street. Mr. Schuurkamp made it clear that it would be impossible to establish on the Union Street site the type of operation contemplated by the report which he said applied to the Queen Street location.

Later in June of 1985 Mr. Schuurkamp said the Appellant "asked the Town if we could construct a facility on 8 Union Street to facilitate the production of smoked products and as well as marinated products."

In May of 1985, Mr. John Schuurkamp prepared plans for the proposed two storey structure proposed for 8 Union Street. These plans were filed as Exhibits 10 - 14 inclusive. The proposed building was to have two levels, the ground level and a loft level. The loft area was designed as a storage area primarily for bottles that would relate to the marination process and also for cartons to be used in shipping the product to market and also to provide toilet facilities. The processing area on the ground level is 20' x 24' or 480 sq. ft.

Mr. John Schuurkamp explained that there is an existing 12' x 24' building owned by his father on the property at 8 Union Street in addition to the dwelling house. This existing building was utilized as far back as 1965 by his father for the production of smoked fish products and has been utilized since 1965 for that purpose. He said that this building is presently under renovation and "is not in use at the present time". It was last used for smoking purposes "about a year and a half ago".

Mr. John Schuurkamp filled out a combined building permit and development permit application form which is dated

June 27, 1985, and was signed by his father. A copy of this application was entered as Exhibit S-15. This permit was for the "purpose of permit/s for the prototype marination process, and for the storage of related materials i.e. bottles, cartons, etc."

At this point in the proceedings, Mr. Spicer interjected to state that this was the first time he had seen the application filed as Exhibit S-15, although he was aware of the unsigned computer generated application filed as Exhibit S-7.

Mr. John Schuurkamp was asked to review the reasons given by Mr. Spicer in his decision dated August 29, 1985, refusing to issue a development permit to the Appellant. He commented firstly on reason number two which stated that the application was considered under the Home Occupation uses defined as a "professional office, arts and crafts workshop or personal services shop" and "of these uses the only one that could possibly be considered would be that of an arts and craft workshop". Mr. Schuurkamp stated that Malcolm Gillis, a planner on staff of the Cape Breton Metro Planning Commission had led him to believe that the proposed use would be allowable under the C-2 zoning category but there was no firm commitment to that effect given.

Mr. Schuurkamp in referring to reason number two given by Mr. Spicer stated that Mr. Spicer was suggesting that there would be over 1000 lbs. of fish processed per day which Mr. Spicer considered was not a small quantity, whereas the Appellant's intention was to process not more than 1000 lbs.

of fish per week which Mr. Schuurkamp indicated was a small quantity. The definition in the Zoning By-law of an arts and craft workshop is a "building or part of a building used by a craftsman, craft or guild for the manufacture of goods in small quantities". Mr. Schuurkamp stated that the Appellant's intention had been to carry out both a smoking and a marination process at the Union Street site although the application for the development permit (Exhibit S-15) referred only to the marination process.

With respect to Mr. Spicer's reason number four that the floor area of the proposed building being 840 sq. ft. was in excess of the allowable area of 500 sq. ft. set out in Part 7, 1(d) of the Town's Land-Use By-law respecting business uses in residential zones, Mr. Schuurkamp stated that only 480 sq. ft. was to be used in the processing of fish.

Mr. Schuurkamp disagreed with Mr. Spicer's reason number five to the effect that "it would be difficult if not impossible to carry out this operation in most areas of the Town without creating an obnoxious odour". He said Mr. Spicer had exaggerated the creation of an obnoxious odour. He said there would be some offal produced but it would be in the best interests of the Appellant to have the offal taken away as soon as possible. He said a large fish plant operated by National Sea was about a 1000 - 1500 feet from the subject site and the Nickerson fish plant was approximately the same distance away. His proposal for disposing of the offal was to place it in sealed containers and have it trucked away.

Mr. Schuurkamp identified Exhibit S-16 as 10 copies of a questionaire circulated by Mr. Schuurkamp and his father on August 5, 1985, to persons residing within 500' of a fish plant located in Glace Bay. the questionaire lists 6 questions requiring a "yes" or "no" answer and each of the 10 copies was signed by a resident. The first question states: "Have you ever experienced an offensive odour coming from the plant where the process of marination is employed?" Other questions relate to whether the persons contacted experienced problems with sea gulls, rodents, and insects. All of the 10 persons who signed the questionaires in Exhibit S-16 stated that they had not experienced an offensive odour from the plant.

Mr. Schuurkamp also conducted a survey of assessed owners of property within a 500' radius of the subject site. The results of this survey appear in Exhibits S-18, S-19 and S-20. One Hundred and Forty-seven persons signed papers which state they have "no objections regarding the proposed process of smoked products" at No. 8 Union Street. One Hundred and Fifty persons signed a similar paper respecting the proposed process of marination of fish.

Mr. Schuurkamp identified Exhibit S-21, as a computer print-out which lists the persons whose names appear on Exhibits S-19 and S-20. Exhibit S-21 is divided into two categories, smoking and marination. It also lists the names of those who signed Exhibits S-19 and S-20, gives their addresses, indicates whether they are owners or tenants, lists whether they are assessed owners within a 500' radius of the subject property, gives the L.R.I.S. property number of each person, gives each person's telephone number and gives the date that they signed the document.

The final exhibit identified by Mr. Schuurkamp is Exhibit S-22 which is a portion of the L.R.I.S. map of a portion of North Sydney which includes the subject site and properties within a radius of 500' or more of the subject site. Exhibit S-22 is colour coded. The properties coloured in green indicate the location of persons in favour of the proposed plant, red denotes properties whose owners are opposed and yellow denotes those who are neutral. Exhibit S-22 indicated that only four property owners shown on S-22 were opposed to the plant. One of these is owned by Gordon MacDougall, whose property is immediately adjacent to the subject property and which bears L.R.I.S. number 15023740. This property has frontage on George Street Extension. The other three properties are located on the east side of Union Street, the first owned by Cecil Green and bearing L.R.I.S. number 15023864, being directly opposite the subject property and secondly, the adjacent property, bearing L.R.I.S. number 15023864, owned by William Dicks and thirdly, a property bearing L.R.I.S. number 15023815 owned by the Salvation Army.

From the coloured map filed as Exhibit S-22 it would appear that the majority of property owners within a radius of 500' more or less of the subject site are in favour of the proposed facility.

Mr. Spicer's cross-examination of Mr. John Schuurkamp revealed that the Appellant's original intention was to carry out both a smoking and a marination process at 8 Union Street but no formal application to this effect had been made. Mr. Schuurkamp stated that as a result of a meeting with the Town Council he was under the impression that the Town would not give approval to a fish smoking operation. Therefore the application to Mr. Spicer related only to the marination process.

John Schuurkamp testified that it would not be financially viable to construct a facility on the subject site for the processing of fish by marination alone as the Appellant's plans called for only 7% of total production to be carried out by the marination process with the remainder by the smoking process. He stated that "smoking is our main objective."

He indicated that the Appellant would process not more than 50,000 lbs. gross of fish a year at the subject site if permission to carry out both smoking and marination were granted. In adition to the two floors in the proposed building there would also be a basement level where sealed vats would be located in which the marinated fish would be stored.

Mr. John Schuurkamp was reluctant to answer questions concerning the Appellant's plans for the use of the existing building on the property presently under renovation. He was of the opinion that this was not relevant to the hearing of the appeal. He did however indicate that one option open to the Appellant would be to continue the fish smoking operation previously carried out in the existing 24' x 12' building. He stated it has not been used for smoking fish for a year and a half. He stated that if a permit to construct the proposed building were granted the existing building would be demolished.

On cross-examination, Mr. John Schuurkamp was asked to consider all of the permitted uses in a C-2 Zone as stated in the Land-Use By-law (Exhibit S-6) and then he was asked if the proposed use of the subject property fitted into any of these permitted uses. He replied that it did not.

On re-examination, Mr. John Schuurkamp described the area of the subject property as being primarily commercial with three properties adjacent to the subject property being used for residential purposes. He also indicated there were some apartment buildings in the neighbourhood and a car dealership as well as a garage.

On questioning by the Board, Mr. Schuurkamp stated that Schuurkamp Smokers Inc. was federally incorporated in December of 1984 but does not own land and up to the present has not operated any business. His father, Gerrit Schuurkamp is the President and his mother is the Vice-President. He described himself as General Manager and stated he is not a shareholder. He indicated that his father would lease land to the company if the company obtained the required permit.

Mr. Schuurkamp was asked by the Board if there was a market for 50,000 lbs. of marinated fish a year. He responded that there was not a market for that quantity of marinated fish in Cape Breton but there was a market for that quantity of smoked fish.

Counsel for the Appellant Gerrit Schuurkamp next called the Appellant. He stated that since 1960 he has been smoking and marinating fish on the subject site on Union Street next to his home. He stated that the marinating process was small, only about 7% of his total production. He stated that he never had any complaints from his neighbours about his operation on Union Street. He said his smoking operation usually takes place in the evening and in his opinion very little odour takes place.

After the evidence of Mr. Gerrit Schuurkamp was completed, Mr. Spicer stated that he did not intend to call evidence but asked the Board if it would be hearing the evidence of some residents of the area who were in opposition to the issuance of a permit. The Board assured Mr. Spicer that any person present who wished to be heard would be heard.

The Board then called Mr. Spicer to testify. He stated he was a little concerned that he was being called to testify in a situation where he did not have the benefit of his own counsel. He said he would testify but he requested that Malcolm Gillis, the planner employed by the Cape Breton Metro Planning Commission be given the opportunity of directing questions to him after he had been examined by the Board and by Counsel for the Appellant. This request was denied but the Board informed Mr. Spicer that Mr. Gillis could testify if he so wished.

Mr. Spicer after being sworn testified that he is the Development Officer for various municipalities in Cape Breton including the Town of North Sydney. He stated that he is the person responsible for issuing development permits for the Town of North Sydney. He does not issue building permits. Mr. Spicer identified Exhibit S-8 as a photocopy of his decision in letter form made August 29, 1985, and addressed to Gerrit Schuurkamp.

Mr. Spicer dealt with the application by way of a computerized version of the application which is prepared in his office and submitted to him. After he received an application he reviews it in relation to the terms of the Town's Land-use By-law.

He was asked by the Board: What is the prime reason in your opinion for rejecting the application? His reply was that the application did not comply with the C-2 provisions or with the Home Occupations provisions of the Land-Use By-law. He was asked: How does the application offend the C-2 Zone requirements? His reply was that the application did not fit into the permitted C-2 uses.

The following are the uses permitted in the General Commercial (C-2) Zone as stated in Part 14, page 48 of the Land-Use By-law:

> "C-2 Uses Permitted
>
> 1. No development permit shall be issued in a General Commercial (C-2) Zone except for one or more of the following uses:
>
> All uses permitted in the R-2 Zone subject to the provisions of the R-2 Zone
> All uses permitted in the C-1 Zone subject to the following requirements stated below
>
> C-2 Zone Requirements
>
> 2. In any General Commercial (C-2) Zone, no development permit shall be issued except in conformity with the following requirements:

Minimum Lot Area	4,500 square feet
Minimum Lot Frontage	45 feet
Minimum Front Yard	20 feet
Minimum Rear Yard	10 feet
Minimum Side Yard	
One Side	4 feet
Other Side	8 feet
Maximum Height of Any Building	40 feet

> Special Provisions -- Commercial Uses Adjacent Residential Uses
>
> 3. Where a commercial use abuts a residential use, the required side and rear yards shall be 15 (fifteen) feet. This provision may be waived where a fence or other visual or physical barrier at least 6 (six) feet in height has been erected and in this case the required side yards shall be 8 (eight) feet and 4 (four) feet respectively and the required rear yard shall be 10 (ten) feet.
>
> Open Storage
>
> 4. No open storage of automobile parts or bodies or parts of other vehicles or machinery or goods, material or equipment shall be placed, stored, or kept as outdoor storage."

Mr. Spicer stated that the Town's Land-Use By-law defines "Home Occupation" in Part 1 Section 25 in the following manner:

> "Home occupation means a professional office, arts and craft workshop or personal service shop conducted entirely within the residence of the home or an accessory building and which also satisfies the requirements specified in part 7."

Part 7 of the Town's Land-use By-law sets forth "General Requirements for All Residential Zones" and specifically lists in Section 1 "Business Uses Permitted In Residential Zones". Section 1 contains certain provisoes to a home occupation use in a dwelling or an accessory building. Section 1(d) states that "if an accessory building is used, it shall not have a floor area greater than five hundred (500) square feet". Since the application for the development permit indicated a floor area of 840 sq. ft., Mr. Spicer rejected the application based on a home occupation use.

Subsection (i) of Section 1 Part 7 of the Land-Use By-law contains a proviso that "the operation shall not be obnoxious by reason of sound, odour, dust, fumes or smoke, or other obnoxious emissions or refuse matter or water carried waste". Mr. Spicer rejected the application partly because in his reason number 5 set out in his letter to the Appellant filed as Exhibit S-8, he considered "that it would be difficult, if not impossible to carry out this operation in most areas of the Town without creating an obnoxious odour". His reason number 5 was predicated on the assumption that the Appellant intended to handle 1,000 lbs. of fish per day. At the hearing Mr. Spicer indicated that he was not as sure then as he was at the time of his decision that the processing would create an obnoxious odour. Nevertheless, Mr. Spicer was firm in his opinion that he had properly rejected the application for the development permit.

Following the evidence of Mr. Spicer, the Board heard from a number of residents of the Town, all of whom were opposed to the issuance of a development permit to the Appellant.

Gordon MacDougall is an accountant who presently resides in the Town of Sydney Mines. He lived previously with his parents in North Sydney at No. 6 Summer Street directly behind the subject property. His mother and sister live at this address at the present time. His main complaint about the process facility was the odour which would result. He also expressed concern that the resale value of his family property would be adversely affected.

William Finney is an oil burner mechanic who resides at No. 7 Union Street across the street from the subject site. No. 7 Union Street is owned by his Mother-in-law. He testified that when Mr. Schuurkamp carried out his fish smoking operation in the past there was an obnoxious odour and "you don't dare open your windows in the evening" when the smoking operation is in process. He has lived at No. 7 Union Street for 18 or 19 years. His main complaint is about fish odour from the proposed facility. On cross-examination he stated he has experienced fish odours from the National Sea and the Nickerson fish plants located in the Town. He was unable to state whether the odour he detected from Mr. Schuurkamp's operation was from a smoking or a marinating process.

Cecil Green a resident and sole owner of 11 Union Street for the past 29 years also complained about an odour he experienced from the Schuurkamp property. On one occasion he had complained to Mrs. Schuurkamp and he had also complained to the Chief of Police and to the Fire Department but to no avail. He stated he hasn't experienced any odour in recent years from the Schuurkamp property. He expressed his concern about a possible devaluation of his property if a new fish processing operation were to commence on the subject property.

William Dicks, a resident of 9 Union Street owned by his Mother since the late 1930's expressed strong concern about the possibility of fish odours from the proposed plant affecting him.

The last person to testify was Ada Green, Wife of Cecil Green, a resident of 11 Union Street who also objected to the possibility of being exposed to fish odours from the subject site.

Post-hearing submissions were filed with the Board by Counsel for the Appellant and by Mr. Spicer, the last one having been received by the Board on October 1, 1986.

The Appellant's Post-hearing submission after referring to the Appellant's two grounds of appeal (fully set out on page 3 of this decision) states as follows:

> "It is admitted that there are no listings for a processing operation as contemplated by the Appellant, specifically in a C-2 Zone. However, it should be noted that existing uses as specified in R-2 uses permitted includes a food processing operation.
>
> In relation to the second ground of appeal, it is submitted that the proposed facility should have been allowed as a business use permitted in a residential zone under Part 7 of the Town of North Sydney Zoning By-law. The home occupation definition is found in Part one of the By-law and the development officer concedes (Exhibit S-8) that the Appellant qualifies as such. The Development officer uses his own interpretation as to what he considers a small quantity of goods manufactured. He says that the manufacture of 1000 pounds of fish per week may not be a small quantity. It is submitted that it is indeed a small quantity of fish, amounting to only 52000 pounds per year. It is a trivial amount compared to what is processed by the major fish plants in the area.
>
> The Development Officer next tried to hang his

hat on the size of the building, which he estimated to be 840 square feet. The evidence of the Appellant is clear that the floor area to be used in the processing process is 480 square feet, well within the requirements of the business uses permitted in residential zones.

The main reason that the Appellant's application was turned down by the development officer seems to be that the same would create an obnoxious odor. Mr. Spicer seems to be imposing his own standards or perceptions in this instance. He is saying, in effect, that a fish processing operation necessarily involves an obnoxious odor. having grown up in an area far removed from the water, Mr. Spicer assumes that you can't process fish without an odor. This flies in the face of demonstrated fact. The Appellant has introduced (Exhibit S-16) a survey conducted of residents living within 200 feet of a large fish plant in Glace Bay. None verify the odor Mr. Spicer envisions. Indeed, the vast majority of the area residents support the Appellant's position (Exhibits S-19, S-20, S-21). Those in opposition have never expressed to the Appellant their complaints regarding the operation he has carried on for twenty (20) years.

Reference should also be made to the area in question. A visit to 8 Union Street shows an area in close proximity to downtown North Sydney and is very close to the operation carried on by National Sea Products Limited. The Appellant's property is adjacent to the property of a construction contractor, whose equipment is in open view. The property of the Appellant is neat and well kept. There is no evidence to suggest that, if this appeal were to be allowed, Gerrit Schuurkamp would deviate from this standard."

Mr. Spicer's Post-hearing submission reads as follows:

The subject property is located in the Town of North Sydney on the corner of George Street and Union Street. Under the Town's Land Use By-law, this property is zoned Commercial (C2). The proposed use as stated on the application, is for a building to house a Prototype Marination Process. In his testimony at the Hearing, Mr. John Schuurkamp stated that the business was to be wholesale and processing of fish. It is my opinion that none of these uses are listed as permitted nor are they similar to those listed in the C2 Zone.

The L.R.I.S. map shows this property as having frontage on George Street and Union Street. This fact was confirmed by John Schuurkamp during the site visit in the presence of the Chairman. Therefore we must refer to the By-law to determine which of these property lines would be considered the "front lot line". Page 7, definition 29(f) Front Lot Line states, 'in the case of a commercial lot the shorter boundary line abutting the street shall be deemed the front lot line...'. Therefore, the George Street lot line would be considered the front lot line as it is approximately forty-five (45) feet and the Union Street is approximately one-hundred (100) feet.

The only residential use that immediately abutts the subject lot is the MacDougall property. The special provision on Page 49, Section 3 of part 14 would therefore apply to this sideyard. As it was not mentioned during the appeal whether or not screening would be provided, a setback of fifteen (15) feet may be required. This in combination with the flanking yard setback of ten (10) feet would only leave approximately twenty (20) feet in which to erect a building forty (40) feet long. The assumption is made that the forty (40) foot building would run with the forty-five (45) foot lot line since the existing house is so located that it would be impossible to locate the building in any other manner.

The next dimension to consider is the twenty (20) foot building width. As the house is approximately thirty-eight (38) feet from the George Street property boundary which is also the front lot line and the minimum front yard is twenty (20) feet, the new building would have to be eighteen (18) feet wide and share a common wall with the existing house and the old garage would have to be removed.

Considering these factors only, the maximum size of the building could only be 18' x 20'. This is far less than what was requested in Mr. Schuurkamp's application.

The required parking for both the Residential use and commercial business would be the next consideration under the Commercial (C2) Zone requirements. It would seem of little point for me to consider this in light of the preceding limit on the building. However, should the Board determine that the use is consistent and the building could be located on the lot with the required setback, I would ask the Board to consider the parking provisions of the by-law and the access provisions for corner lots Section 15, Part 4, Page 22 and Section 6(b), Part 4, Page 19 respectively.

The second reason for lodging the appeal is that the proposed facility should have been allowed under Part 7 of the Land Use By-law as a business use permitted in residential zones. Introduction to Part 7.1 states:

> 'Nothing in this By-law shall prevent the use of a dwelling or an accessory building in any Residential or Rural Residential Zone for a home occupation...'

Part 1.25 defines a home occupation as '...a professional office, arts and crafts workshop or personal service shop conducted entirely within the residence of the home or an accessory building and which also satisfies the requirements specified in Part 7.' Each of the three uses mentioned in definition #25 are also defined in Part 1, (#5, 37 & 38). It is my opinion that Mr. Schuurkamp's proposal does not fit any of the three above mentioned definitions.

In my letter to Mr. Schuurkamp, dated August 29, 1985, I stated '...the only use that could be considered would be that of an arts and crafts workshop.' If it can be successfully argued that Mr. Schuurkamp's proposal could be considered an arts and crafts workshop it must then be proven this specific proposal complies with the criteria (a to i) listed in Part 7 of the Land Use By-law.

A. I believe Mr. Schuurkamp could operate his proposed business without altering the external appearance of his dwelling and accessory building to the extent that the business conducted inside would not be noticeable upon a visual inspection of the exterior of both buildings.

B. It is my recollection that, in his testimony, Mr. Schuurkamp stated, besides his father, they intended to eventually employ approximately three to five people. It was during this appeal hearing that this evidence was first brought to my attention or I would have also listed this as a reason for refusal in my August 29, 1985 letter to Mr. Schuurkamp.

C. Since this criteria refers to the dwelling being used I determined it to be irrelevant in relation to this specific proposal.

D. While the type written application form does not indicate a building size, the evidence presented to the Board was that of a 20' x 40' building was proposed. Without describing the relevance of including the basement and the loft when determining floor area, total floor area of the building proposed as a one-storey structure alone is eight-hundred (800) sq. ft. This is well in excess of the maximum five-hundred (500) sq. ft. required or the four-hundred and fifty (450) sq. ft. under Section 2 of Part 4.

E.F.G. I believe Mr. Schuurkamp could comply with these criteria.

H. Mr. Schuurkamp would be required to, at least, provide two additional parking spaces other than that required for the dwelling. Since it has come to my attention, as a result of the hearing, that Mr. Schuurkamp's property does, in fact, front on an extension of George Street, as well as Union Street, Section 6(b) of Part 4 becomes particularly relevant. In the absence of a surveyor's plot plan, it is my opinion, the only significant open area on the lot for a 20' x 40' building would be in the northwest sector of the lot, if the existing garage was removed. Consequently, the access to this building would be within thirty feet of the intersection of Union Street and George Street and in direct contravention of Section 6(b).

I. Based on the testimony given at the hearing, determining whether the operation would be obnoxious is certainly debatable. Mr. Schuurkamp, in his defense, believed it would not be. The neighbouring residents clearly thought otherwise. The fact that many of those present did not continuously complain to Mr. Schuurkamp or the Town Authorities does not necessarily mean the operation conducted in the past was not obnoxious, it probably is testimony of their tolerance.

As a business being conducted in an accessory building, it must be determined that the building could be located on the lot and meet the required setback. The front yard requirement would be twenty (20) feet from George Street and the flanking yard requirement would be fifteen (15) feet from Union Street, again leaving an area less than that required to locate the building and would require the removal of the existing accessory garage.

Based on the evidence provided, I believe my decision

> to refuse issuance of a development permit to Mr. Schuurkamp was in compliance with the Land Use By-law of the Town of North Sydney."

At the conclusion of the presentation of the sworn testimony the Board visited the subject site and the adjacent lands. The Appellant's lot is relatively small being 45' x 100' on which the Appellant's dwelling house approximately 30' x 40' and an existing garage is located. the Appellant seeks approval to construct a building 20' x 24' on the northern portion of his land, his dwelling house being located approximately 20' north of his South boundary.

The Appellant's land is bounded on the East by Union Street where it has frontage of 100' and on the North by George Street Extension where it has frontage of 45'. It is bounded on the West by property owned by Gordon MacDougall used for residential purposes, and on the South by property owned by Salter's Agencies Ltd. used for commercial purposes.

The subject land is zoned C-2 and is situate in an area of the Town also zoned C-2 although the existing uses in this area are varied, consisting of some residential uses and some commercial uses.

This appeal having been brought pursuant to the provisions of Section 78(1) of the Planning Act, the Board has two options open to it under s.s.(3) of Section 78, namely to: (a) confirm the decision of the Municipal Development Officer for the Town of Glace Bay or to (b) allow the appeal by ordering that the permit be granted "but no permit shall be granted that is inconsistent with the Land-Use By-law ...".

The Board having reviewed the evidence adduced at the hearing, having visited the subject site and surrounding area, having perused the post hearing submissions filed on behalf of the Appellant and the Development Officer, and having considered the application for the development permit in relation to the Town's Land-Use By-law, confirms the decision of the Development Officer in refusing to issue the development permit requested.

The Board agrees with the development officer that the proposed use set out in the Appellant's application, namely "for the prototype marination process, and for storage of related materials, i.e. bottles, cartons, etc." is not a use that is permitted under the General Commercial (C-2) Zone of the Town's Land-Use By-law.

The allowable uses in the C-2 Zone are (1) any uses permitted in the R-2 Zone but subject to the provisions of the R-2 Zone and (2) any uses permitted in the C-1 Zone but subject to the C-2 Zone requirements. In the opinion of the Board the permitted uses in the Residential Converted Dwelling (R-2) Zone do not include the processing of fish. Although the Downtown Commercial (C-1) Zone has a wide range of commercial and residential uses these uses do not include the processing of fish.

The Town's Land-Use By-law sets out in Part 7 "General Requirements For All Residential Zones" and makes provision for "home occupation" business uses in residential zones. Section 1 of part 7 states that "nothing in this By-law shall prevent the use of a dwelling or an accessory building in any Residential or Rural Residential Zone for a home occupation with certain specific provisoes set forth in clauses (a) to (i) inclusive. The first three provisoes, (a) to (c) inclusive, are not relevant to the case at hand as they relate to home occupations in dwellings. Proviso (d) states that "if an accessory building is used, it shall not have a floor area greater than five hundred (500) square feet". This proviso clearly prevents the proposed building from being used for home occupation purposes even if the proposed use could qualify as a home occupation within the definition set out in item No. 25 of part 1 of the Land-Use By-law. "Home Occupation" means "a professional office, arts and crafts workshop or personal service shop conducted entirely within the residence of the home or an accessory building...". In the Board's opinion the proposed fish processing use clearly does not come within the definition of "Home Occupation."

Proviso (i) in Section 1 of part 7 of the Land-Use By-law states that "the operation shall not be obnoxious by reason of sound, odour, dust, fumes or smoke, or other obnoxious emission or refuse matter or water carried waste". A great deal of evidence at the hearing was directed to the question of whether the proposed use by the Appellant was "obnoxious". Those persons who live in close proximity of the subject site were strongly of the opinion that the fish smoking process previously carried on by the Appellant was obnoxious because of the odour from the smoke. These persons were apprehensive that the proposed fish marination process would also be obnoxious by virtue of offensive fish odours being generated. The Appellant testified that there would be very little odour and it would not be obnoxious. Mr. Spicer after hearing the Appellant's evidence was not sure whether there would be an obnoxious odour from the proposed fish marination process. The Board is unable to conclude from the evidence that the propsed use would be obnoxious.

From a perusal of the Town's Land-use By-law it would appear that the appropriate zone in which the proposed fish marinating process could operate is the Downtown Industrial (M-2) Zone which permits among other uses "Fishing and Related Industries". The proposed use is also a permitted use in the Waterfront Industrial (M-3) Zone.

The Board being of the opinion that the permit applied for by the Appellant is inconsistent with the Land-Use By-law of the Town of North Sydney, therefore pursuant to s.s. (3)(a) of Section 78 of the Planning Act, Statutes of Nova Scotia, 1983, c. 9, confirms the decision of the Development Officer in refusing to issue to the Appellant a Municipal Development Permit for the construction of a building to be used to marinate fish and for the storage of related materials, i.e. bottles, cartons, etc. and dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of October, A.D., 1986.

R.H. BLOIS,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Glengarry Developments Ltd. v. County of Halifax

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-1 TO R-2--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, S. 63(4)(c)--BEECHVILLE-LAKESIDE-TIMBERLEA MPS POLICIES P-23, P-26, P-89--BEECHVILLE-LAKESIDE-TIMBERLEA LAND-USE BY-LAW, S. 7.2

This is an appeal from a decision of the Council of the Municipality of the County of Halifax which refused to amend its Land-Use By-law by rezoning 5.9 acres of land in Timberlea from R-1 Single-Unit Dwelling Zone to R-2 Two-Unit Dwelling Zone. Zoning in the general area is R-1 with occasional individual small parcels zoned R-2 or R-3. The area is covered by the Beechville-Lakeside-Timberlea Municipal Planning Strategy (MPS).

HELD: The appeal is allowed. The Board instructs Council to rezone the subject lands from R-1 to R-2.

In an appeal such as this, the Board is required to determine whether the decision of Council reasonably carries out the intent of the MPS. In view of the comparative isolation of the subject lands from existing housing or housing proposed for other areas in the lands owned by Glengarry, the Board is not convinced that 20 double housing units will affect the integrity of the existing single family portions of the area. Twenty possible double housing units in a development with the potential of 400 lots, 110 of which are already developed, does not seem an unreasonable proportionate mix of two-family and single family housing. Existing sewer and water services are also under-utilized. Re-zoning would fulfill the stated intent of residential designation for future land use in the MPS, which is "to protect low density residential development as well as to encourage a housing mix and other compatible uses." Council's decision did not reasonably carry out the intent of the MPS.

FILE NO: NSMB-503-85-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by Glengarry Developments Limited from a decision of the Council of the Municipality of the County of Halifax made November 25, 1985, which refused to rezone a 5.9 acre parcel of land on the south side of the Fraser Road in Timberlea from R-1 Single-Unit Dwelling Zone to R-2 Two-Unit Dwelling Zone.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: A.L. CALDWELL, Q.C., for the Appellant

ROBERT G. CRAGG, Q.C., for the Municipality of the County of Halifax.

DECISION

A hearing was held by the Board on May 26, 1986 in the Expropriations Compensation Boardroom, Suite 904, 1660 Hollis Street, Halifax, on an appeal by Glengarry Developments Limited from a decision of the Council of the Municipality of the County of Halifax made November 25, 1985, which refused to amend its Land-use By-law by rezoning a 5.9 acre parcel of land on the south side of the Fraser Road in Timberlea from R-1 Single-Unit Dwelling Zone to R-2 Two-Unit Dwelling Zone. The Notice of Appeal was dated November 29, 1985 and received by the Board on December 2, 1985. The stated grounds of the Appeal are:

> "The decision of the County Council for the Municipality of the County of Halifax
>
> (i) does not reasonably carry out the intent of the Municipal Planning Strategy;
>
> (ii) is contrary to and inconsistent with good planning principles, and
>
> (iii) such other grounds as may appear."

Service of the Notice of Appeal and Notice of Hearing and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board. With the agreement of the parties, the Board assumed jurisdiction to hear the merits of the appeal.

The subject lands are located in Timberlea to the north of Highway 103 and approximately two miles east of Exit 4, and are serviceable with municipal sewer and water. The 5.9 acre parcel has road access from the south side of the Fraser Road which runs approximately 2,500 feet westward off the St. Margarets Bay Road (Highway 3). Properties fronting on the north side of the Fraser Road have the Canadian National Railway right-of-way as their rear (North or Northwestern) boundary. Adjacent and nearly parallel to the north of the CNR right-of-way is the Bay Road (Highway 3). Access to the area of the subject property is from the intersection of the Fraser Road and Highway 3 over a level crossing of the CNR tracks. Fraser Road ends in a dead-end to the west of the subject property where it would intersect with the CNR line again.

The zoning in the area of the subject property is generally R-1 with occasional individual small parcels of land Zoned R-2 or R-3. An elementary school, Glengarry School is located to the east of the subject property at the intersection of Charles Road, which runs south off the Fraser Road, and Richard Street. The school property and an adjacent parcel are Zoned P-2 Community Facility Zone and P-1 open space zone respectively.

The area is part of District 2 in the Municipality and is covered by the Beechville-Lakeside-Timberlea Municipal Planning Strategy (M.P.S.) approved by the Minister on October 20, 1982.

Counsel for the Appellant called three witnesses. Counsel for the Municipality called none. Three area residents spoke on their own behalf.

Michael Hanusiak, a Planner for four years with the Municipality's Department of Planning and Development and the author of the Staff Report to Council recommending approval of the rezoning application, reviewed the processing of the application, the applicable policies of the M.P.S. for the area and the requirements of the Land-use By-law.

The M.P.S. for Beechville-Lakeside-Timberlea (Exhibit G-4) contains a Generalized Future Land-use map which indicates that the subject property is designed residential. Mr. Hanusiak pointed out the statement of land use intent set out on Page 30 of the M.P.S. as follows:

> " Future land use within the Plan Area shall be guided by land use policy and more specifically by the Designations of the Generalized Future Land Use Map as follows:
>
> Residential
> Commercial
> Industrial
> Resource
> Conservation
>
> The Residential Designation is intended to protect low density residential development as well as to encourage a housing mix and other compatible uses."

In the section of the M.P.S. dealing specifically with the Residential Designation, an introductory paragraph summarizes the existing residential housing situation and future intentions for residential development as follows:

> " Although the predominant housing type within the Plan Area is single unit, greater opportunities for housing mix will become available with new municipal services. The Residential Designation is designed to recognize the importance of the low density environment and complementary community uses, while acknowledging the need for an eventual housing mix. In recognition of the number of business uses associated with a residence, such uses will generally be permitted. Nevertheless, their scale and appearance shall be limited to a manner appropriate to the residential environment."

Mr. Hanusiak considered Policies 23 and 26 to be relevant to this rezoning application. Those policies state:

> "P-23 Within the Residential Designation as shown on the Generalized Future Land Use Map (Map 1) it shall be the intention of Council to preserve the existing single unit dwelling residential environment with its associated institutional and open space uses."

> "P-26 Notwithstanding Policy P-23, Council may consider low density residential developments

> which are of a scale and location not inconsistent with existing neighbourhoods. In this regard two unit dwellings may be permitted by amendment to the zoning by-law and with regard to Policy P-89."

Policy P-89 lists criteria to be considered by Council in evaluating a rezoning application as follows:

> "P-89 In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following:
>
> (i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by laws and regulations.
>
> (ii) that the proposal is not premature or inappropriate by reason of:
>
> (a) the financial capability of the Municipality to absorb any costs relating to the development;
>
> (b) the adequacy of sewer and water services;
>
> (c) the adequacy of road networks leading or adjacent to, or within the development; and
>
> (d) the potential for damage to or for destruction of designated historic buildings and sites.
>
> (iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:
>
> (a) type of use;
>
> (b) height, bulk and lot coverage of any proposed building;
>
> (c) traffic generation, access to and egress from the site, and parking;

(d) open storage and outdoor display;

(e) signs; and

(f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

In the Land-use By-law for Beechville-Lakeside-Timberlea, Exhibit G-5, Mr. Hanusiak reviewed the R-2 Zone requirements which are as follows:

"7.2 R-2 ZONE REQUIREMENTS: RESIDENTIAL USES

In any R-2 Zone, where uses are permitted as Residential Uses, no development permit shall be issued except in conformity with the following:

Minimum Lot Area:	6,000 square feet (558 sq.m.), or 3,000 square feet (279 sq.m.) per dwelling unit where each dwelling unit of a two unit dwelling is located on a separate lot and where central services are available 20,000 square feet (1858 sq.m.) where central services are not available
Minimum Frontage:	60 feet (18.3 m.), or 30 feet (9.1 m.) per unit where each dwelling unit of a two unit dwelling is located on a separate lot and where central services are available 100 feet (30.5 m.) where central services are not available
Minimum Front or Flankage Yard	20 feet (6.1 m.)

Minimum Rear or Side Yard	8 feet (2.4 m.) or 0.0 feet (0.0 m.) from the side being common with another dwelling unit
Maximum Lot Coverage	35 per cent
Maximum Height of Main Building	35 feet (10.7 m.)
Minimum Width of Main Building	20 feet (6.1 m.)"

Mr. Hanusiak compared the minimum and maximum standards required in R-1 and R-2 zones and noted that both zones have the same front yard and side yard set back, the same maximum lot coverage and maximum building height, and the same minimum building width. The minimum lot area in an R-2 zone however is 3,000 square feet for each unit of a two-unit dwelling with each of the two units located on a separate lot, whereas the minimum lot area in an R-1 zone is 6,000 square feet. Mr. Hanusiak pointed out that Single Unit Dwellings are a permissable use in an R-2 Zone.

The "analysis" in the Staff Report prepared for the Planning Advisory Committee (PAC) and Council by Mr. Hanusiak reads as follows:

> " The municipal planning strategy for Timberlea/Lakeside/Beechville designates the lands in question "Residential". Within this designation priority has been given to the continued development and protection of the single unit dwelling environment. However, the planning strategy also recognizes that with the introduction of central services a variety of housing types will be required to meet the future population and economic needs of the community. The strategy provides for the

> introduction of higher density developments including two unit dwellings, by amendment to the land use by-law.
>
> As shown on Figure No. 2, development along the Fraser Road is primarily single unit with three lots presently under development. Only one or two lots in the proposed development are likely to abut any of these existing lots. The development will create a new portion of the community and therefore satisfies the plan's intent of protecting the scale of existing neighbourhoods.
>
> The area to be developed will be serviced with municipal water and sewer facilities and traffic from the proposed development is not felt to be a significant concern. The Department of Transportation supports the proposed road access onto Fraser Road.
>
> In conclusion, the proposed development supports the plan's objectives of encouraging a mixture of housing in a compatible manner with the existing community."

Mr. Hanusiak stated that in the preparation of the Staff Report he had solicited comments from the Municipal Engineering and Works Department, the District School Board and the Department of Transportation. None had reacted negatively to the proposed rezoning as it affected its jurisdiction.

Mr. Hanusiak commented on the planning consequences of integrating single and double residential units which he felt presented no difficulty. He preferred some clustering of each housing type rather than an alternating arrangement, but he felt that both single and double units represented low density residential development. Mr. Hanusiak believed that Council's decision to reject this rezoning application did not reasonably carry out the intent of the M.P.S. which recognizes a need for different housing forms and encourages a housing mix provided that the criteria enumerated in Section 89 of the M.P.S. are satisfied. In the application in question, Mr. Hanusiak felt the clear separation of existing R-1 areas from the area proposed for R-2 zoning by a large wedge-shaped undeveloped parcel of R-1 land in private ownership further enhanced the compatibility of the area proposed for R-2 development with the remainder of Glengarry Gardens and other single-family housing in the area.

In cross-examination, Mr. Hanusiak agreed that the policies of the M.P.S. were intented to retain single family residential neighbourhoods but argued that while existing single family areas and their integrity be maintained, nevertheless the M.P.S. allows for the possibility of a change from R-1 zoning. He felt that this was a particularly good application relative to the policies of the M.P.S. which provide for a change to increased density in residential development. In Mr. Hanusiak's opinion, the proposed rezoning from R-1 to R-2 for the subject property represented "the lowest order of integration of residential densities." If this application is not in keeping with the intent of the M.P.S. he felt no other proposed rezoning to allow integration of R-1 and a higher density residential zoning could be accepted. Correspondingly, if the intent of the M.P.S. had been to retain a single family residential environment in the entire plan area, he felt the M.P.S. would not have allowed the optional possibility of the Council's approval of a higher density of residential development. In conclusion, Mr. Hanusiak felt that Council's decision to reject this application for rezoning did not reasonably carry out the intent of the M.P.S.

Mr. Murray Nickerson, President of Glengarry Developments Limited since the company was formed in 1970, outlined the achievements of the development company to date and its future plans. Mr. Nickerson stated that there are 110 existing homes in Glengarry Gardens and the potential of 300 additional lots. The policy of the developer has been to sell lots with restrictive covenants governing design, size and use in accordance with the existing zoning. The nearest single family development in Glengarry Gardens to the lands proposed for R-2 development were five existing homes and one under construction on Birchdale Avenue which runs east off Charles Road. The nearest of these would be approximately 600 feet from the area proposed for R-2 zoning. Mr. Nickerson said that 20 double units had been proposed for the subject lands to allow a mix of housing in the Glengarry development and to be able to offer more affordable homes for young people and seniors.

Ian Rankin, President of Project Consultants Limited for the past three years and a member of the Canadian Institute of Planners as an engineer/project co-ordinator gave evidence in support of the developer's application for R-2 zoning. Glengarry Developments Limited is a client of Project Consultants Limited. Mr. Rankin did not attend the public hearing held by Council and had not read the Minutes of that hearing at which Council rejected the R-2 zoning application. He agreed however, with the information, analysis and recommendation contained in the Staff Report to Council on this application.

Mr. Rankin felt that Council's decision did not reasonably carry out the intent of the M.P.S. because the proposed density was the closest and most compatible to R-1 zoning. His opinion was based on the policies of the M.P.S. and the Staff Report. Mr. Rankin felt that the developer's application had met all the criteria set out in M.P.S. Policy 89 and that it met the intent of both (mandatory) Policy 23 which obligates Council to retain the integrity of existing single family development and (discretionary) Policy 26 which allows a mix of housing types.

Bruce Rawding, a Solicitor and the owner since January 31, 1984 of Lot H-14 of the Glengarry Gardens development, located at 77 Charles Road, spoke in opposition to the proposed rezoning of the subject lands. His property is approximately 500 feet from the proposed R-2 area, which he became aware of in late October or November of 1985. Mr. Rawding prepared, and with others circulated, a petition expressing opposition to the proposed R-2 zoning. The petition was presented to Council at the public hearing with 20-30 of the petitioners in attendance.

Mr. Rawding's principle concerns were the following: possible property devaluation; possible school overcrowding; potential increased traffic hazards; misleading information given to purchasers of lots in Glengarry that the development would continue to be restricted to single family housing and potential switch in the dominant housing form in the development from R-1 to R-2.

In cross-examination, Mr. Rawding acknowledged that he had not read the M.P.S. or land-use by-law for the area. He had been a candidate for County Council in the October 1985 Municipal election and while campaigning, had heard negative comments in another residential subdivision in Timberlea about new R-2 development in a predominantly R-1 area. He stated that he had wanted to make sure people in his area were concerned about this (proposed rezoning) and able to give their opinion about it one way or another.

In Mr. Rawding's opinion, single family residential development was preferable to higher density residential development because of lower population density and retention of property values. Mr. Rawding said he was unaware that the M.P.S. states that the existing population density of the Beechville-Lakeside-Timberlea area is 6 persons per acre whereas the municipal services can accommodate 17 persons per acre, which is described as "a modest population density for single family residential development." Mr. Rawding linked retention of property value to school capacity. He felt that an R-2 development of 40 households would strain the school capacity of Glengarry School but he acknowledged that the development of Glengarry Gardens should not be limited by the availability of elementary school space. He explained that his belief that the households in his area contained 4.7 persons on average was based on the opinion of a person working with him in his campaign for municipal council. He agreed that Section 4 of the "covenants" (Exhibit G-7) pertaining to the title of his property which restrict any building on the lot to "detached private dwelling house" was modified by Section 20 in the "covenants" allowing the grantor, Glengarry Developments Limited, to "waive, alter or modify" such restrictions.

Malcolm Carmichael, who has lived for 41 years at 67 Fraser Road, stated that his objections to the proposed rezoning were primarily related to traffic concerns. Mr. Carmichael's property is located on the north side of the Fraser Road. It has 127 feet of frontage on that road and the house is set back 140 feet from the road. His driveway is increasingly used as a pedestrian shortcut to the Fraser Road and he feared this practice, already too frequent for his liking, would increase with increased development in the area. He believed that traffic on the Fraser Road has doubled in the past 5 years and expressed anxiety about further increases and the pressure they would put on the only exit point from Glengarry Gardens and the Fraser Road. Mr. Carmichael had no objection to semi-detached housing but was opposed to duplexes and felt two-family units should be scattered rather than concentrated in one area.

In cross-examination, Mr. Carmichael gave evidence on the school capacity issue. St. Andrews School and Glengarry School operate as a unit with one principal and one Board of Trustees. Each School has grades Primary to six. Mr. Carmichael, who had been secretary to this (Timberlea Elementary) Board of Trustees for 36 years, reviewed the history of the schools and their catchment area. While Glengarry School has had as many as 504 pupils, he believed enrollment currently was approximately 387 students. He concluded that the school was not filled to capacity, but was "not far from it."

Mr. Keith Fraser who lives at 3 Kingsmere Court in Glengarry Gardens and owns property at 93 Fraser Road, the family property where he was born and brought up, circulated the petition opposing the proposed rezoning in the "upper end of Fraser Road" among people he felt would be most directly affected by the zoning change. He pointed out that the large parcel of land on the north side of Fraser Road which separates the existing holdings of Glengarry Developments Limited to the west and the area proposed for rezoning to the east, is comprised of a triangular area of crown land and the balance is owned by Mr. Fraser's brother-in-law, David Dellapina.

Mr. Fraser's principle concerns with the proposed rezoning were the increased population density which would result from R-2 Zoning, which he felt was at variance with the "relatively rural setting" that purchasers of property in the area found attractive, and the increased traffic which would result from the R-2 zoning, putting more pressure on the only entrance/exit point to Glengarry Gardens and the Fraser Road area. He was not opposed to single family development of the subject lands.

In cross-examination, Mr. Fraser acknowledged that the area would probably not retain its rural character for long and that the train traffic on the tracks at the entrance to Glengarry Gardens and the Fraser Road had declined in the past few years. Mr. Fraser has one child attending Glengarry School but was not particularly concerned with the school capacity issue.

In an appeal such as this from a refusal by Council to amend its Land-use By-law, the Board is required to determine whether the decision of Council reasonably carries out the intent of the Municipal Planning Strategy. The Board has considered the evidence adduced at the hearing and the oral argument by Counsel for the Appellant and the Municipality made at its conclusion. The Board has visited the site and surrounding area.

The Board heard much evidence on the mandatory requirement in Policy 23 and elsewhere in the M.P.S., that Council protect the single family residential environment. Contrasted with this theme in the M.P.S. was the discretionary ability of Council, stated in M.P.S. Policy P. 26, to allow other types of residential density. In view of the comparative isolation of the subject lands proposed for R-2 Zoning from existing housing or housing proposed for other areas in the lands owned by Glengarry Developments Limited, the Board is not convinced that 20 double housing units will affect the integrity of the existing single family portions of Glengarry Gardens or the Fraser Road. Given the very considerable under-utilization of existing sewer and water services in Beechville, Lakeside and Timberlea and the stated option of consideration of higher density residential development provided for in the M.P.S., the Board agrees with the planner that Council's decision did not reasonably carry out the intent of the M.P.S. The possibility of 20 double housing units in a development with the potential of 400 lots, 110 of which are already developed, does not seem an unreasonable proportionate mix of two-family housing and single family housing, particularly as the area proposed for R-2 development is a considerable distance from existing or potential single family development in Glengarry Gardens.

In the opinion of the Board, the rezoning to R-2 of this undeveloped border area in the holdings of Glengarry Developments Limited fulfills the stated intent of the residential designation for future land use in the M.P.S. which "is intended to protect low density residential development as well as to encourage a housing mix and other compatible uses."

For these reasons the Board, pursuant to Section 63(4)(c) of the Planning Act, allows the appeal and instructs Council to amend its Land-use By-law by rezoning the 5.9 acre parcel of land in question from R-1 Single-Unit Dwelling Zone to R-2 Two-Unit Dwelling Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of October, A.D., 1986.

EASalton
ELIZABETH SALTON
Vice-Chairman

Village of New Minas v. County of Kings

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT FOUR-UNIT APARTMENT BUILDING--"AGGRIEVED PERSON"--INTERPRETATION ACT, S. 6(1)(s)--MUNICIPAL BOARD ACT, SS. 16(1), 29--PLANNING ACT, SS. 3(k), 71(1)(a),(3),(4)

This is an appeal by The Village Commissioners of the Village of New Minas from a decision of the Council of the Municipality of the County of Kings approving a development agreement with A.B. to permit the construction of a four-unit apartment building in the Milne subdivision, Village of New Minas, County of Kings.

HELD: The appeal is dismissed.

The Vilalge is not an "aggrieved person" within the meaning of the Planning Act. It is not a Municipality as defined by the Planning Act. New Minas receives its status from the Village Service Act and that statute does not expressly or by necessary implication empower the Village to deal with the planning matters in this appeal. Even if it had sufficient corporate powers to prosecute a planning appeal, the Village has brought insufficient evidence to show that it has suffered any pecuniary loss from the decision so as to qualify as an aggrieved person. Additionally, if the Village were an aggrieved person and the Board had jurisdiction, it is unable to find that the proposed agreement is inconsistent with the intent of the MPS.

NSMB-521-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **THE VILLAGE COMMISSIONERS OF THE VILLAGE OF NEW MINAS,** a body incorporated under the provisions of the Village Service Act, Appellant, from the decision of the Council of the Municipality of the County of Kings, Respondent, made on April 1, 1985, approving a contract development with Allan Bishop to permit the construction of a four-unit apartment building on property situate at the southeast corner of Milne Avenue and Prospect Road in the Village of New Minas, County of Kings, Province of Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: DERRICK J. KIMBALL, LL.B., for the Appellant;

JAMES E. DEWAR, LL.B., for the Respondent Municipality.

DECISION

Pursuant to Section 16(1) of Chapter 9 S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member, RICHARD L. WELDON, to hear this planning appeal at the Board's September 15, 1986, sittings at the Courthouse, Number 2 Courtroom, Kentville, Nova Scotia.

The Notice of Appeal is dated April 24, 1986, was received by the Board on April 24, 1986, and states that the Appellant appeals the April 1, 1986, decision of the Council agreeing to enter into a development agreement with one Allan Bishop to permit the construction of a four-unit apartment building on property situate at the southeast corner of Milne Avenue and Prospect Road in the Village of New Minas, in the Municipality of the County of Kings, Province of Nova Scotia.

The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman took no objection to the Notice of Appeal.

The lands in question, graphically set out in Exhibit M-14 owned by the Applicant Allan Bishop, are situate in the Milne subdivision of New Minas Village (hereinafter called "the Village") at the southeastern corner of Prospect Road and Milne Avenue. On this site (the size of one large building lot) the Applicant, Allan Bishop, proposes to erect under a development agreement a four unit apartment dwelling. On a view of the site, the Board saw that the lot was vacant, located between existing homes and had no apparent grades or drainage problems that would make it patently unsuitable for the development proposed.

At the commencement of the hearing at Courtroom No. 2, at 1:00 p.m. on September 15, 1986, all parties present agreed all preliminary services, filings, and advertisements had been accomplished in their appropriate forms and times. On affidavit proof of such service, the Board assumed jurisdiction to hear the appeal.

The first witness for the Appellant was Linda

Lockhart, Clerk Treasurer of the Village. She has been employed in that capacity since November of 1984. Among her duties as Clerk Treasurer, she attends all meetings of the Village Commissioners, records all minutes, keeps the accounts for the Village, and does her work in the Village office located on Commercial Street.

Mrs. Lockhart knows the background of the proposal on appeal before the Board in the present appeal. She identified the petition (Exhibit M-11) of more than 70 local residents opposed to the development agreement proposal who petitioned the Village Commissioners to "appeal the recent decision by King's County Council permitting an apartment building to be constructed in R-1 zoning located on the corner of Milne Avenue and Prospect Road." The petition's signatories are homeowning residents of Catherine Crescent, Prospect Road, Milne Avenue and Michael Street, all streets located in whole or in part within the Milne Subdivision.

At a meeting, the Village Commissioners authorized the commencement of this appeal as requested in the petition.

The Village Commissioners provide for the Village a Recreation Department, street lighting, water supply system, central sewer treatment for the Village sewage, and sidewalk maintenance.

Revenues to provide these amenities are raised by the Village mostly through real property taxation, grants in lieu of taxes, conditional transfers from other governments, and the sale of services. Exhibit M-12, the Village Estimates, shows in detail how the funds are raised. Revenues of the Village, as raised through an area rate, are a factor of the gross assessment of the Village.

The Village has a population of approximately 4,400. Mrs. Lockhart stated that the Village does not have a private act of incorporation but is a body corporate of the type established under the Village Service Act being C. 329, R.S.N.S. 1967, as amended.

The Village owns real property within the Village, but none near the lot in question. The Village owns the sewer and water lines which are located in every street including the streets which border the subject lot.

Greg Clarke was the next witness for the Appellant. He lives at 1030 Milne Avenue and has lived there for over 11 years.

The subject lot is about 5 lots from his house lot, "just around the corner". Both lots are part of the Milne Subdivision. The subject lot is on the corner "just going into the subdivision." The zoning of the Subdivision is R-1. This witness understood when he bought his land that R-1 zoning meant that the subdivision could only be developed in single family homes. He has just recently discovered that in the Village R-1 zoning permits the construction of duplexes.

The subdivision comes in two distinct sections, a lower section in which Mr. Clarke's house was the last house built [some 11 years previously] and an upper section higher up the hill. The subject land is part of the lower section. Almost all the other houses built in the lower section are single family dwellings, owner occupied. Mr. Clarke says the area is a quiet residential area comprised almost entirely of single family dwellings inhabited by a lot of young parents with children.

Mr. Clarke is concerned with the intrusion of a 4 unit apartment building occupied by tenants into a owner-occupied single family neighbourhood. He fears the development into multiple unit apartments of the large open field across the street from the subject lands on the west of Milne Avenue, given the precedent of the subject proposed development. Once one amendment to existing zoning is permitted it becomes progressively easier for Council to grant further amendments. "His quiet residential area isn't quiet anymore". Present traffic is light in the subdivision but development into more apartment units will bring on more traffic than the development of the same lots as single family units. Prospect Road is a main arterial road leading into and out of the Village and, and even under present light traffic conditions, traffic access out of the subdivision at the corner of Milne Avenue and Prospect Road is already difficult because of visibility problems at the corner. More traffic being generated in the subdivision can only exacerbate an already unsatisfactory situation. The driveway from the proposed building goes out into Prospect Road very near its intersection with Milne Avenue and thus will make traffic conditions at that intersection worse. This particular intersection carries about 50% of the traffic generated in the subdivision.

Mr. Clarke believes the presence of an apartment unit juxtaposed with a large vacant lot on the opposite side of the road at the entrance to his subdivision will deter many prospective purchasers of his home and thus the market value of his home would be lowered.

Mr. Clarke opposes 4 units being placed on a lot no bigger than the lot (100' x 137') on which he has a single unit built. He felt that the body which approved the development agreement did not take these factors into account. He noted that the subdivision provided no playground areas inside its borders and this lack would be compounded by the increased population density which the installation of the 4-unit apartment would cause.

Mr. Clarke criticized the planning process in vogue in the Municipality of the County of Kings (hereinafter called the Municipality) which allowed Council's Planning Advisory Committee (PAC) to consider a development agreement proposal and to recommend that proposal to Council without first hearing from the citizens most directly affected. He felt that by the time the proposal came to the public hearing stage before Council the result of that public hearing stage, because of the recommendation from the PAC, was more or less a foregone conclusion and the views of the close neighbours had no chance of receiving a fair shake from the Council. In the view of Mr. Clarke, Council merely rubber stamped the recommendations of the PAC.

By Mr. Clarke's admission, two separate duplexes of an over and under kind could be built on the subject land without any additional Council approval. Allowable densities in such a case would be no greater than the densities that would result from the proposed development.

The Municipality called Fred Wendt, Ardoise, Hants County, Development Planner for the Municipality, which position he has occupied for over five and one-half years. He has a degree in Planning from the Nova Scotia College of Art and Design. Mr. Wendt is a member of the Canadian Institute of Planners. In his present employment he analyzes applications for development agreements and rezonings in order to make recommendations to PAC and Council as to their suitability when interpreted in the context of the New Minas Sector Plan, (a portion of the Municipality's Municipal Planning Strategy (MPS)) and the Land-use By-law and the Planning Act.

Mr. Dewar qualified, to the Board's satisfaction, Mr. Wendt as an expert entitled to offer opinion evidence on matters of planning as they affect the Municipality with special reference to the Village.

Mr. Wendt advised Mr. Bishop (the Applicant) that it was possible to have the subject land developed for four units of multiple-family development under a development agreement with the Municipality. On February 16, 1986, Mr. Bishop applied for rezoning of the subject lands for a 4-unit apartment building. Mr. Wendt drafted a development agreement and a supporting report which he presented, with Mr. Bishop's concurrence, to a PAC meeting of February 26, 1986. All new multiple developments outside of the previously multiple family zone in New Minas were done by development agreement as no other type of rezoning to multiple family zone was possible under the sector plan.

Mr. Wendt went through the development agreement checklist provided in the sector plan one by one and expressed the view that the proposal would meet all its applicable criteria. He recounted the placement of the advertisement for the public hearing on the development agreement proposal to be held by Council March 26, 1986.

The public hearing was held and subsequently Council approved the proposal on April 1, 1986.

Mr. Wendt holds and advocates that the sector plan provides for a mix of housing types in the Village through the use of development agreements.

A senior citizen's complex, about one-half a mile from the subject site, is the nearest multiple residential unit to the subject site.

Counsel for the Municipality argued that the Village was not an aggrieved person under S. 71(1)(a) of the Planning Act being S.N.S., 1983, c. 9 and therefore not a qualified appellant before the Board. He firstly argued that the Village had no corporate power spelled out expressly or impliedly in its incorporating statute, the Village Service Act. Section 6(1)(s) of the Interpretation Act R.S.N.S. 1967 c. 151 gives the Village no additional powers. Even if the Village has corporate powers to engage in planning matters and therefore in this appeal as an ancillary right to those powers, he submits it is not an aggrieved person within the meaning of the Planning Act.

Counsel for the Village argued that the Board had only the power to determine whether or not the Village was an aggrieved person, that the Board should determine that the Village is an aggrieved person and that the Board should then find upon the evidence that the Council's decision was contrary to the intent of the MPS sector plan and should reverse the decision of Council.

In order to expedite matters both counsel urged the Board to hear all the evidence on the appeal as if it had jurisdiction to proceed, rule upon the jurisdictional issues, and then, if necessary in order finally to determine the appeal, to proceed to make a decision on the merits of the appeal. The Board agreed to proceed in the manner suggested.

All parties agree Mr. Clarke might have qualified as an aggrieved person but he was not an appellant so the Board cannot take jurisdiction from his possible status.

The Village is not a Municipality. (See s. 3(k) of the Planning Act).

Strict logic would rule out the possibility of the Village being an aggrieved person since the Village Service Act does not spell out any power to the Village to engage in planning matters. Strict logic may not apply since we have Jones J.'s (as he then was) decision in Bedford Service Commission v. Provincial Planning Appeal Board 28 N.S.R. (2nd) 605[1] which interpreted the phrase "interested person" under the then current Planning Act. At page 608 he says:

> "The question for determination by the Board was whether the Board was an 'interested person'. I think it is clear from the decision of the Board that the question which the Board directed itself to was whether the Commission had the corporate capacity to initiate the appeal. While the two questions are closely related, in my view the Board had only one issue to determine and that was whether or not the Commission was an 'interested person'. ... One might conclude that a body corporate which has no power to deal with a subject has no interest in the matter. ... Certainly a body corporate might be an 'interested person' from the mere fact that it holds real property in the area.
>
> In my view the Commission is 'an interested person' ... It is an incorporated body owning land in the area. Viewed from the broader perspective, the Commission is concerned with communal matters in the district. Having regard to the powers of the Commission and its history as successor to the Bedford Ratepayers Association ... it is 'an interested person' ... .Supreme Court of Canada ... Bedford Service Commission v. The Attorney General of Nova Scotia and The Halifax-Dartmouth Regional Authority, 19 N.S.R. (2nd) 310. The powers referred to in that case are equally applicable to the present proceedings."

At first reading Bedford [1] would lead to the analogous finding that if the Commission in that case were an "interested person" then the Village in the present appeal is an aggrieved person. Or, at the very least, the Village could be an "aggrieved person".

The Board has no trouble adopting the summary of one of the rulings in Bedford [1] as restated at p.6 of the Municipality's memorandum:

> "It is acknowledged however that the component parts of the term 'aggrieved person' should be examined together and not in isolation from one another."

and this the Board proposes to do, however difficult such combined analysis might be, since it believes itself bound by this cited interpretation of the findings in Bedford [1] applied to fit the facts of this appeal. The portion of the decision, so interpreted, is in no way contradicted by any court of equal or superior jurisdiction. This interpretation was imposed by certiorari on the Provincial Planning Appeal Board, historical predecessor of the present Board in matters pertaining to planning.

The Board then conceives its duty to first determine whether or not the Village is an "aggrieved person" within the meaning of the Planning Act s. 71(1)(a).

Assuming for the moment that the Village has corporate powers sufficient to allow it to commence and prosecute a planning appeal before the Board, the Village has brought insufficient evidence to show that it has suffered any pecuniary loss from the decision of Council to qualify as an aggrieved person. The issue of aggrieved person has been dealt with recently and has been thoroughly canvassed by the Board in numerous decisions starting with Riverlake Residents Association appeal.

In addition one cannot assume that the Village is a corporation having a capacity to launch a planning appeal. In contrast to Bedford [1], one must read with care the decision of MacIntosh J. in Bedford Service Commission v. Attorney General of Nova Scotia, Halifax-Dartmouth Regional Authority and Metropolitan Area Planning Commission 18 N.S.R. (2d) 155 [2] as affirmed on appeal to the Supreme Court of Canada in Bedford Service Commission v. The Attorney General of Nova Scotia and The Halifax-Dartmouth Regional Authority, 19 N.S.R. (2nd) 310 [3]. In Bedford [2] MacIntosh J. at p. 160 says:

> "... the Bedford Service Commission is a creature of statute. The Bedford Service Commission Act [sic] has power to act in a given set of circumstances as provided in that statute.
>
> The power to commence and maintain this action must either be expressly stated in the statute or arise therefrom by necessary implication. ... the Commission's statutory powers [are] in part ...[to] provide for the District ... a suitable system for the ... disposal of garbage.
>
> In my opinion 'by necessary implication' section 5(f) empowers the Commission to sue on matters pertinent to those powers expressly set forth in the Statute ...[p. 161].
>
> Inasmuch as the proposed waste disposal area is within the geographical limits of the area served by the ... Commission, and that as such is a matter within the scope of its statutory powers, I find the ...Commission has the status and power to commence and maintain this action."

Laskin C.J.C. giving an oral decision in Bedford

[3] at p. 311, says:

> "We are all of the opinion that this appeal must be allowed ... and the judgment of MacIntosh J. restored."

The Board, were it necessary to do so, would follow the decision of MacIntosh J. in Bedford [2] as affirmed in the Supreme Court of Canada to the extent, and if, his statement of the law conflicts with that of Jones J. in Bedford [1]. Thus the Board follows the statement of MacIntosh J. found in Bedford [2] at page 160:

> "The power to commence and maintain this action must either be expressly stated in the statute or arise therefrom by necessary implication."

and finds that the Village Service Act does not expressly or by necessary implication empower the Village to deal with the planning matters dealt with in this appeal and for this reason, as well, the Village is not and cannot be an aggrieved person within the meaning of the Planning Act.

On the evidence, even if the Board had jurisdiction to hear this appeal, the Board would be unable to find that the proposed agreement is inconsistent with the intent of the MPS (see s. 71(3) of the Planning Act) and therefore the Board would have no mandate to interfere with the decision of the Council (see s. 72(5) of the same statute).

The Appeal is hereby dismissed. Pursuant to s. 71(4) of the Planning Act the Board confirms the decision of the Council and pursuant to s. 29 of the Municipal Board

Act s. 9 S.N.S. 1981, an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 4th day of November, A.D., 1986.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

Power v. County of Cape Breton

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM RR-6 TO M-2 TO PERMIT SALVAGE YARD AND VEHICLE MAINTENANCE BUILDING --PROTECTION OF BEST INTERESTS OF MUNICIPALITY--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 63(1),(6),(7)

This is an appeal from a decision of the Municipality of the County of Cape Breton refusing to amend the Land-Use By-law by rezoning about 5 acres of land on the north side of Jessome Road from a rural residential use zone (RR-6) to a heavy industrial use zone (M-2). The Appellant sought to use the subject lands for a salvage yard and a vehicle maintenance building for a contracting business. No Municipal Planning Strategy (MPS) exists for the district involved. The Cape Breton Metro Planning Commission recommended against the rezoning, as did the Planning Advisory Committee.

HELD: The Board confirms the decision of Council. The appeal is dismissed.

In the absence of an MPS, the Board, under s. 63(6) of the Planning Act, must determine whether the decision of Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality. None of the prior investigators or decison makers in relation to this application explicitly defined the best interests of the Municipality. The Board draws the inference here that the decision of Council is itself a strong indication of what is in the best interests of the Municipality. This is because the decision of Council here is apparently an informed one, no indication exists that it acted on any inaccurate advice, the members of the public most likely to be affected opposed the rezoning, the local Councillor studied the application and canvassed his constituents and opposed the rezoning, the rezoning would permit the installation and use of an asphalt plant (which the Appellant had an interest in), the planner handling the application testified that the rezoning would not be in the best interests of the Municipality, the citizens in the immediate area opposed the rezoning, and the decision of Council was unanimous. When the bulk of the citizens affected, the planners and the politicians most directly responsible agree, the Board should be careful before coming to a contrary conclusion. The refusal decision was consistent with and necessary for the protection of the best interests of the Municipality. No case of undue hardship or extraordinary or compelling circumstances has been made.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **CHARLES POWER**, from the decision of the Council of the Municipality of the County of Cape Breton, made on November 7, 1985, refusing to amend the Municipality's Land-Use By-law by changing the zoning of certain lands at or near the North side of Jessome Road, from RR-6 to M-2.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: WILLIAM BURCHELL, LL.B., for the Appellant, CHARLES POWER;

DAVID N. MUISE, LL.B., for the Respondent Municipality of the County of Cape Breton.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board member RICHARD L. WELDON, to hear this planning appeal at the Board's October 2, 1986, sittings at the Chambers (hereinafter called the "Chambers") of the Council of the Municipality of the County of Cape Breton (hereinafter called the "Council"), Grand Lake Road, Sydney, Nova Scotia.

The Notice of Appeal is dated November 27, 1985, and was filed with the Board on November 28, 1985. The Notice of Appeal was not originally accompanied by an undertaking to pay the costs of advertising the Notice of Hearing as required by the Board's Rules of Practice and Procedure Respecting Appeals Under the Planning Act. The Chairman allowed the Appellant 14 days more to comply and file this undertaking.

The Appellant appeals the November 7th, 1985, decision of the Council refusing the Appellant's application to amend the Land-Use By-law of the Municipality of the County of Cape Breton's (hereinafter called the "Municipality") by rezoning of certain lands of the Appellant situate on the North side of Jessome Road from RR-6 to M-2.

In this area of the Municipality in which the subject property is located, RR-6 is a land use designation which permits rural residential uses. That designation would not permit a salvage yard use nor a vehicle maintenance building for a contracting business, which uses the Appellant seeks. The proposed rezoning to M-2, a heavy industrial use zone, would permit heavy industrial uses of the subject land including use as a salvage yard as well as the other use sought.

The lands in question, graphically set out in Exhibit P-8, owned by the Appellant, are situate on the north side of Jessome Road east of its intersection with the Point Aconi road. On the evidence, confirmed by two views of the site, the subject lands have access to Jessome Road by way of a straight roadway leading north from the Jessome Road.

At the commencement of the hearing at the Chambers at 10:00 a.m. on October 2, 1986, all parties present agreed all preliminary services, filings, and advertisements had been accomplished in their appropriate forms and times. After all necessary affidavit proof of such services, the Board assumed jurisdiction to hear the appeal.

Mr. Muise, Counsel for the Municipality, noted there was no Municipal Planning Strategy (MPS) for the district involved in this appeal. Mr. Muise tendered a Ministerial Order (Exhibit P-7) extending the effect of the Zoning By-law as provided for in an amendment to the Planning Act being S.N.S. 1985, c. 41.

There were three applications for amendments to the Land-Use By-law to allow salvage yards before the PAC at the same time, this one at Point Aconi, one at Little Pond (which has already been the subject of an appeal to this Board sub nomen Lee's Auto Salvage Limited, NSMB-500-85-P[1]), and another at George's River which has never been before the Board.

The subject land is about a 5-acre western portion of a larger block (of 11 acres) in the ownership of the Appellant which extends eastwardly until it reaches the shores of Little Bras D'Or. The lot proposed to be rezoned is approximately 600' long and 231' wide and contains approximately 5 acres exclusive of its entrance "right-of-way" which is approximately 66' wide and 584' long off Jessome Road.

The Cape Breton Metro Planning Commission (CBMPC) reports to the Municipality's Planning Advisory Committee (PAC). CBMPC looks after the planning needs of the Municipality, the City of Sydney, the Towns of Glace Bay, North Sydney and Sydney

Mines. The Development Officers for those areas are also provided by Metro Planning.

CBMPC, as the planning agent of the Municipality, on September 6, 1985, recommended to the PAC against Mr. Charles Power's application of August 21 1985. On September 9, 1985 the PAC approved a date for advertisement of a public hearing on Mr. Power's application to rezone and also provided for an onsite visitation of the subject property by members of the PAC. On November 4, 1985, the PAC recommended to Council that Mr. Power's application be denied. Councillor-elect Ted Marsh attended this meeting and spoke against the proposed rezoning. At the meeting of Council on November 7, 1985 (in Exhibit P-8, p. 12 erroneously dated September 18, 1985), after hearing all who wished to speak on the proposed rezoning a motion to "deny" the rezoning was passed. The Appellant here appeals that refusal to rezone.

Council allowed anyone wishing to speak on the rezoning issue a full opportunity to speak before it.

As his only witness Mr. Burchell called the Appellant, Mr. Charles H. Power, 562 Point Aconi Road, contractor. His existing house and business are located on 285' x 385' lot fronting on the Point Aconi Road. He presently lives on that land and keeps his repair shops and construction equipment on that land. In close proximity to that lot he owns an 11-acre piece of land which contains the 5-acre lot in question together with a 66' "right-of-way" leading North from the Jessome Road to the subject land a distance of 584.95'. He wishes to put a repair shop and a salvage yard on the subject land. He intends in that shop to repair the equipment of others as well as his own. He believes he would be creating two or three more shop jobs if his proposal were to be approved.

Wooded softwood stands, closely spaced and about 20' high, grow both east and west of the "right-of-way". The same wood cover lies to the south and north of the subject land. The subject land is not visible from the Jessome Road and is on approximately the same elevation as the surface of the Jessome Road which lies to the south of the lands.

Mr. Power's nearest neighbours to the subject lands are Charles and Jennifer Chapman. Mr. Power says the Chapmans cannot see the site of the proposed operations from their residence. According to Mr. Power he and his brother-in-law could see from their own residences the operations to be conducted in the proposed rezoned area. These residences lie to the southwest of the subject lands and have only a small view plane overlooking the subject site which Mr. Power proposes to obstruct by a high fence.

Mr. Power promises to relocate all of the construction equipment from his own backyard where it is now located to the area of the proposed rezoning, clearing up his present property.

Mr. Power initially approached Malcolm Gillis planner for the CBMPC with the present proposal to rezone. CBMPC took the application and put it before PAC and before Council and it was turned down. Mr. Power did not attend the Council meeting at which the proposed rezoning was rejected.

Mr. Power said he had asked Councillor Marsh for a copy of the petition against the rezoning and Councillor Marsh told him he could not have a copy.

Mr. Power felt there were about 8 homes within 500' of the proposed rezoning.

Mr. Power stated he had received Department of Health approval for a salvage yard on the subject site and he had applied for a salvage yard license which was being withheld pending the outcome of his rezoning application.

Mr. Power proposes to build a 40' x 60' building to house his repair business on the subject site. He has already roughed out the "right-of-way". In the past he has used eastern portions of the subject land as a gravel pit and he has stripped some coal from the land as well.

Mr. Power owns an asphalt plant which he is not operating currently and which is located in his house yard. He had no intention to place an asphalt plant on the subject property. If he does reassemble the asphalt plant he proposes to relocate it at either Frenchvale or Baddeck.

Mr. Power agrees traffic on the unpaved Jessome Road would increase if Mr. Power relocated his operations from their present location to the subject property since his business generated traffic now only uses his present property's entrance onto the paved Point Aconi Road.

Mr. Malcolm Gillis of Sydney, is a planner with CBMPC. On agreement of Counsel he was qualified by the Board as a planner entitled to give opinion evidence concerning matters of planning within the Municipality.

Mr. Gillis expressed concern that the proposed rezoning was too close to existing residences, that there would be an increase in traffic, that there were a variety of unsuitable uses available in the M-2 zone, and that the nature of the salvage yard business was messy almost by definition. He was not impressed by the buffer of trees around the proposed rezoning area: his preference was for a topographic buffer such as a hill. There has been extensive clearing of the trees on the subject site already.

Mr. Gillis had the opinion that the area surrounding the subject property was a rural residential area. There is a mixture of older primarily single family homes and newer ones as well. As a planner Mr. Gillis feared the asphalt plant use permitted under the M-2 zone. Mr. Gillis noted that Mr. Power's present salvage yard was run in full view of the motoring public on both the Point Aconi Road and the Jessome Road and this caused him to wonder whether Mr. Power's new proposed salvage yard would be run with the same disregard of the Salvage Yard Licensing Act.

Mr. Gillis had the opinion that Council's refusal of this rezoning application was in the best interests of the Municipality primarily because of the heavy uses permitted [especially that of asphalt plant] under the proposed M-2 zoning. Area residents expressed the same concerns over the proposed rezoning as did Mr. Gillis. He believes Mr. Power's present use of his home lot is a legal non-conforming use.

Mr. Gillis knew of two applications made by Mr. Power for a permit to operate an asphalt plant and those two applications had already been turned down.

Councillor Ted Marsh, a resident of Jessome Road, testified on his own behalf. He introduced into evidence a letter from the Point Aconi Community Development Association (Exhibit P-13) reinforcing the previous opposition of the residents of the area to the proposed rezoning and putting emphasis on the fact that their opposition continues unabated. The letter takes note of Mr. Power's extraction of coal and gravel from the site without any permits. It suggests a proper alternative location for the uses proposed by Mr. Power would be the isolated vacant lands lying alongside the new highway leading to the Prince Mine. Councillor Marsh is the councillor for the area and he has spoken to many of the residents along the Point Aconi Road and "they are quite objectional" to the proposed rezoning. He could find none of his constituents to whom he has spoken in favour of the proposed rezoning. Many feared the advent of a possible asphalt plant if the rezoning were passed. There are 30 homes on the Jessome Road and there are 40 school children from Grade 6 downward who walk along this road on their way to the school bus.

Councillor Marsh does not believe it is in the best interests of the Municipality to have another salvage yard. If members of the public want second hand automotive parts, Councillor Marsh believes there are already enough salvage yards to serve the using public.

Jennifer Chapman identified herself as a resident of a property located at the southeast corner of the subject lot and read from her letter tendered to the Board as Exhibit P-5 which was strongly against the proposed rezoning.

Margaret Gracie, another resident of the area, tendered a letter (Exhibit P-14), which agreed with the views expressed by Mrs. Chapman.

Three applications for rezoning to allow salvage yard operations had been received by the planners at approximately the same time and had been prepared and presented to the same meeting of the PAC. Mr. Gillis decided not to write three separate reports but to write one general report for all three applications. In the opinion of Mr. Gillis, the factors involved in assessing all three applications were generally similar. All three areas had residential development, the applications were for the Industrial M-2 zone (the heaviest Industrial Zone in the Municipality) and there was no guarantee in zoning that the tree buffer that existed in each case would be maintained. In two of the applications (which two include the subject application) there was an obvious disregard, intentional or not, for the planning regulations of the Municipality.

In respect to the subject application, there was a loudly expressed public concern that the rezoning, when granted, would be used for purposes other than those stated by the Appellant and there was no way in the existing zoning by-law to restrict such other uses once the rezoning had been granted. There is no MPS and therefore no development agreement controls possible as development agreements need to be authorized by policies in an MPS.

Under Section 63(6) of the Planning Act, the Board has to determine whether the decision of Council to refuse the Appellant's application to amend the Land-Use By-law in the manner requested is inconsistent with or unnecessary for the protection of the best interests of the Municipality.

The Board, is therefore left to define those best interests on the evidence before it. Once having done that the Board can then proceed to find whether or not the refusal decision by Council:

1. is inconsistent with those best interests of the Municipality; or
2. is unnecessary for the protection of those best interests; or
3. is both.

The Board holds the opinion that if the decision to refuse is inconsistent with the best interests of the Municipality then it can interfere with that decision. If the decision was unnecessary for the protection of those best interests, then the Board can also interfere with the refusal decision even if it is consistent with the best interests of the Municipality.

A thorough perusal of the documentary record of the proceedings before CBMPC, the PAC and Council tendered to the Board by the Municipality as Exhibit P-8, shows no express opinion of any of the prior investigators or decision makers explicitly defining the best interests of the Municipality or attempting to define the necessity or consistency of the decision as it relates to those best interests.

Mr. Gillis gathered three applications, closely linked in the time of the making of these applications and tried to deal with them in his recommendations all together. On the other two applications for salvage yards one has been before this Board (Lee's Auto Salvage [1]) and one has not but it is fair to assume that, like this application, each had good and bad features from a planning point of view. In treating the three applications together (each of which must stand or fall on its own merits), Mr. Gillis created a real risk that the bad points of one proposal might colour the treatment received by another proposal. In the view of the Board this risk could easily have been avoided by treating each application separately. East Appellant was entitled to separate attention to his own application.

The Board might easily draw the inference in an appeal like this one that the decision of Council is, itself, a strong indication of what is in the best interests of the Municipality even when there was no such express finding by Council.

The Board will draw such a inference here from this refusal because:

1. The decision of Council, in considering this particular application, from the evidence before the Board, was apparently an informed decision. The patent confusion of Council

alluded to in the Lee's Auto Salvage [1] decision did not occur when Council decided on the Power application so that the Board would tend to give the decision of Council weight in assessing whether or not to draw a positive inference that the refusal decision was in the best interests of the Municipality from the fact of the refusal alone.

2. Council in its handling of the Power application gave no indication of having acted on any inaccurate advice. Thus its action on the Power application could be helpful to the Board in defining "the best interests of the Municipality".

3. The evidence adduced before the Board shows that the members of the public most likely to be affected most directly by the proposed rezoning were to a person (excepting always the Applicant) opposed to the rezoning.

4. The local Councillor had studied the application to rezone, canvassed his constituents, and came out thoroughly against the proposed rezoning.

5. The proposed rezoning would permit the installation and use of an asphalt plant on the subject property. The Appellant owned an asphalt plant (not now in use) located close to the subject property. He had applied to set up and use that plant in the same general area of the Jessome

Road and been already refused. On the subject property he had extracted coal and gravel without regard to the fact that he did not have the permits so to do. All witnesses sworn before the Board in this appeal (which includes the Appellant) testified that there should be no asphalt plant established in this rural residential community. If the rezoning is granted there is a real risk that at some time in the future an asphalt plant would be installed on the subject property, if not by the present Appellant, then by some successor in title to him.

6. The planner who handled this application testified before this Board that in his opinion the proposed rezoning would not be in the best interests of the Municipality and this opinion was not destroyed in cross-examination or contradicted by any divergent planning opinion. All the evidence adduced in this hearing either supported the planner's opinion or, at the least, did not contradict it.

7. The citizens in the immediate area of the subject land came out against the proposed rezoning.

8. The decision of Council on this application was unanimous.

When the bulk of the citizens most directly affected, the planners, and the politicians most directly responsible agree on what constitutes the "best interests of the Municipality" the Board should be somewhat careful in coming to a contrary conclusion.

The Board has before it the evidence of the economic impact of the proposal on the depressed community in which it would be situate. The Board finds that the nearest inhabitants to the site of this proposal, when fully informed of both sides of the issue, are to a person opposed to the proposed rezoning.

The Board therefore finds that the refusal decision of Council was consistent with, and necessary for the preservation of, the best interests of the Municipality and the Board is obliged not to interfere with the decision of Council by virtue of Section 63(1) of the Planning Act. The Board therefore confirms the decision of Council and dismisses this appeal.

The Board finds that no case of undue hardship or extraordinary or compelling circumstances has been made out under Section 63(7) of the Planning Act.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of November, A.D., 1986.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-1 TO R-2 TO PERMIT DUPLEX HOUSING--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--PLANNING ACT, SS. 63(1)(b),(3),(4),(5)--TOWN OF KENTVILLE MPS INTRODUCTION SECTION AND POLICIES B-1, B-3(iii), K-3, K-4, K-5, K-11

This is an appeal from a decision of the Council of the Town of Kentville refusing to amend the Town's Land-Use By-law by rezoning approx. 8.3 acres of land of the Appellant from Residential Single Family (R-1) to Residential Two-Family (R-2) to permit duplex housing. The area is bounded on the north by the Municipality of the County of Kings, on the east and south by lots zoned R-1 and on the west by R-1 and P-1 lands.

HELD: The Board confirms the decision of Council. The appeal is dismissed.

The Board is obliged by s. 63(3) of the Planning Act to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy" (MPS). This intent is to be ascertained by a perusal of the entire MPS with emphasis on those portions of the plan which are especially relevant to the case at hand. In the Town of Kentville MPS the expression "multi-unit residential" does not include "duplexes" and therefore the criteria for multi-unit development set out in Policy B-3 do not apply. Amendments to the Town's Land-Use By-law are governed by Policy K-4 of the MPS. The purpose of zoning is to create compatability and stability in the use of land. Council as well as the Board should be concerned with maintaining the integrity of the land-use by-laws so as to create some degree of confidence in the planning process. The Board in the case at hand is of the opinion that a potential conflict or incompatibility arises between the proposed development of R-2 uses and the existing R-1 uses in adjacent areas. Adequate controls to reduce conflict as is contemplated by Policy K-4(C) are not included in the R-2 zone, and no provision is made for "buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent R-1 land uses and traffic" as per Policy K-4(E). The owners of R-1 properties on three sides of the subject lots have the right to expect the Town Council not to rezone immediately adjacent lands also zoned R-1 to a higher density use unless the zoning clearly is within the intent of the Town's MPS. Here the proposed rezoning is not within the intent and Council's decision reasonably carries out the intent of the MPS.

NSMB-520-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1983, c. 9, as amended;

- and -

IN THE MATTER OF: An Appeal by **F.B. SPINNEY & H.P. HANNA DEVELOPMENTS LTD.** from the decision of the Council of the Town of Kentville made April 9, 1986, refusing to amend the Town's Land-Use By-law by rezoning lands on Challenger Drive and Sherry Avenue from Residential Single Family (R-1) Zone to Residential Two Family (R-2) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: JAMES E. DEWAR, LL.B., for the Appellant, F.B. Spinney & H.P. Hanna Developments Ltd.;

ALAN T. TUFTS, LL.B., for the Town of Kentville.

DECISION

This is an appeal under the provisions of Section 63 s.s. (1)(b) of the Planning Act, by **F.B. SPINNEY & H.P. HANNA DEVELOPMENTS LTD.**, a body corporate, from the decision of the Council of the Town of Kentville made April 9, 1986, refusing to approve the Appellant's application to have the Town's Land-Use By-law amended by rezoning lands owned by the Appellant and situate on Challenger Drive and Sherry Avenue, being Lots 13 - 35 and 39 and 40 in the Oakdene Estates subdivision, from Residential Single Family (R-1)

Zone to Residential Two Family (R-2) Zone. A copy of a subdivision plan of Lots 1 - 40 inclusive, 44 - 49 inclusive and P-1 of the Oakdene Subdivision is filed as Exhibit K-12.

The subject lands consist of approximately 8.3 acres of land located in the northend of the Town of Kentville. These lands are bounded on the north by De Ell Road which appears to be immediately south of the boundary between the Town and the Municipality of the County of Kings. The subject lands are bounded on the west and the east by lands within the Oakdene Estates Subdivision and on the south by lands within the Burmont Subdivision. With the exception of lot No. 14, the subject lands are undeveloped.

The Appellant's Notice of Appeal is dated April 17, 1986, was received by the Board on April 30, 1986, and is marked Exhibit K-1. At the request of the Board the Appellant filed an Amended Notice of Appeal on April 30, 1986, to comply with the Board's Rules of Practice and Procedure for appeals under the Planning Act. This Amended Notice of Appeal is marked Exhibit K-2.

The hearing of the appeal was held in the Town Council Chambers, 354 Main Street, Kentville, Nova Scotia, on Tuesday, September 9, 1986.

The Board, being satisfied that:

1. The Notice of Appeal was filed within 21 days of the date of the decision of the Council;

2. The Amended Notice of Appeal complies with the Board's Rules of Practice and Procedure Respecting Appeals under the Planning Act;

3. Notice of Hearing was delivered to all residences within a 500 foot radius of the subject property, and

4. The Notice of Hearing was advertised by three insertions in the Kentville Advertiser on August 19th, and 26th, 1986, and September 2, 1986,

assumed jurisdiction to hear the appeal on the merits.

The grounds of appeal set forth in the Appellant's Notice of Appeal on file as Exhibit K-1 state that "all By-laws met and conform to Municipal Planning Strategy."

Evidence was given by Frank Spinney, Harvey P. Hanna, Steven Rivers, Ronald W. Gibbons, Marion Ross, Doreen Taylor and Dr. James Rafferty.

The first witness to testify was Frank Spinney called by counsel for the Appellant. Mr. Spinney resides at Coldbrook, in the County of Kings and is a part owner and secretary of the Appellant corporation incorporated in 1986. Mr. Spinney is a building contractor and normally builds in the Municipality of the County of Kings. He stated that he considered the area of the Town in which the subject lots are located to be ideal for duplex houses because they were close to the Town centre and the subdivision had two entrances. Furthermore, he said that the lots were reasonably close to New Minas by virtue of a new road leading to that community. He said there were presently two large apartment buildings to the east and about three apartment buildings to the west of the subdivision. To the south of the subject lots are located single family houses some of which, he said, have apartments in them. Because the subject lots were zoned Single Family Residential (R-1), the Appellant was obliged to apply to the Town to have the lots rezoned in order to have the right to build duplexes.

Mr. Spinney stated that the Appellant company has offered to sell most of its lots, the first 10 of which are presently serviced. Sewer and water are available from the Town of Kentville. The proposed duplexes which the Appellant would construct, would sell in the $80,000 range. He indicated that Mr. Hanna owns Lot NO. 14 on which he built a house. In the past Mr. Spinney has been involved in the development of low cost housing. He has been involved in house building for 18 years.

Mr. Spinney was of the opinion that the housing located north of the subject lots would be valued at approximately $30,000 each. Before making the application for rezoning he had consulted the town's planner, Mr. Gibbons and was encouraged by Mr. Gibbons to make the application. He said he had built four houses in Coldbrook which he rents and he would rent the duplexes he would build on the subject lots. He stated that lot 14 on which Mr. Hanna has built a house and in which Mr. Hanna resides is the only approved lot. Lot 14 is located in the northwest sector of the subject lots and has frontage on De Ell Road to the north and on Sherry Avenue on the south.

Mr. Spinney said he considers that duplex development for the subject lots is better for the subject area than low cost housing. He said the Appellant has been approached to develop the subject lots with low cost housing but he prefers duplex housing of a type which he thought would increase land values in the area. In his opinion low cost housing would be the one bedroom type which sells for under $40,000 for both lot and house. The subject lots are presently for sale at $10,500, serviced at the developer's expense.

On cross-examination Mr. Spinney stated that his intention was to build both single family and two family dwellings on the subject lots. He would then rent the duplex units. He said that a new hospital to be built would mean that the duplexes could be rented to the workers employed in building the hospital.

The next witness to testify was H.P. Hanna also called by Counsel for the Appellant. He is the owner of and resides in a dwelling located on Lot No. 14 in the Oakdene Estates Subdivision. He is the president and part owner of the Appellant corporation. He said he built his house on Lot No. 14 in the spring of 1986 as a single family dwelling, but it is constructed in such a manner that it could be easily converted into a duplex as it has two bathrooms and two kitchens. He values his property on lot No. 14 in the amount of $75,000. If the rezoning is allowed, he thought this property would be worth $80,000. He said there is a strong market for duplex type accommodation. He also said he had no intention of building duplexes on all of the 25 lots involved in the appeal. In his opinion the properties on the west side of Campbell Road (Lots 1 - 12 inclusive) which abut Lots 15 - 25 inclusive in the Oakdene Subdivision have values in the $60,000 - $65,000 range. He said there are two apartment complexes on the east side of Campbell Road.

On cross-examination Mr. Hanna stated that the Appellant has not built any houses to date and the subject lots (except Mr. Spinney's Lot 14) are the only lands owned by the Appellant.

The next witness to give evidence was Steven Rivers of 16 James Street in the Town of Kentville who is employed as a policy planner by the Municipality of the County of Kings. He holds a degree in Geography from Queen's University. He appeared as an interested person and not as a witness for any of the parties to the appeal. James Street is a street running east and west in the Town about 200' south of the southern-most portion of the lots in question.

Mr. Rivers referred to the overall goal of the Town's Municipal Development Plan (Exhibit K-5) stated on page 1 of the Plan as "to encourage future development to occur in an orderly manner which does not detract from the Town's pleasant living environment". He said this overall goal had to be kept in mind in assessing the proposed development of the subject lands.

Mr. Rivers introduced a large L.R.I.S. map of Kentville marked as Exhibit K-14 on which the area of the entire Oakdene Estates subdivision is shown surrounded by lands coloured in yellow and outside this area is shown four parcels of land coloured in brown. He said the properties shown coloured yellow represent single family dwellings and the brown coloured properties are either duplexes or apartments. The properties shown in colour are all the properties on both sides of De Ell Road, Campbell Road, James Street and Oakdene Avenue. The Oakdene Estates subdivision is bounded generally by these four streets.

Mr. Rivers pointed out that despite the statement by witnesses for the developer that all of the lots would not be used for duplex purposes if the rezoning were permitted, nevertheless that would be the Appellant's right and in Mr. River's opinion if that happened the neighbourhood would be significantly altered by the creation of a development with a much higher density than the surrounding uses and that is contrary to a principle of planning in which in most cases the higher density development is encouraged to locate on the surrounding arterial and collector roads with lower density normally on the interior. He said that the only "designated" roads in North Kentville are Belcher Street, Cornwallis Street and Scott Drive as arterials.

Mr. Rivers suggested that since neither the M.D.P. or the Zoning By-law have any definition of single family development or multi-unit residential development he had to look at the dictionary meaning of multi-family development. He then referred to a definition in Webster's Collegiate Dictionary which defines "multiple" as "involving more than one".

He said the Town's M.D.P. contains a number of sections which deal with the rezoning of land for multi-family purposes. One is Policy B-3(iii) on page 19 which states that "the use shall be compatible with adjacent uses". He said that multiple family development is in many cases not considered compatible with single family development. He said he may be "stretching the point" to call duplexes multiple family development. He suggested that the type of density created by duplex development would not be compatible with the single family community adjacent to it. He explained that the incompatibility relates to the density in the adjacent uses.

Mr. Rivers then referred to the Town's M.D.P. relating to amendments to the Zoning By-law and in particular to certain criteria set out in Policy K-4(C)(i) which states that the Council shall ensure "that controls are included in the Zone so as to reduce conflict between the development and adjacent or nearby land use by reason of:

"(1) Type of use; and

....

(vii) Similar matters of planning concern."

Mr. Rivers was of the opinion that if the rezoning of the subject lots was approved the potential would exist for the development of all these lots as duplexes and this would offend the goal of the plan to not detract from the pleasant living environment in the Town of Kentville. He thought it would be an unpleasant living environment if an "abnormal" neighbourhood were created. He was of the opinion that it would be abnormal to have the subject lots developed 100% for duplex purposes when Table 1 on page 21 of the Plan shows that duplexes accounted for slightly less than 10% of the total dwelling units in the Town. It is to be noted that Table 1 is derived from the 1976 Statistics Canada figures and does not necessarily reflect the situation in 1986.

On cross-examination Mr. Rivers stated that the incompatibility he was concerned about arises out of the fact that there would be a greater density of dwelling units under the R-2 zone. He thought if the subject lots were all developed for duplex purposes this would have a negative effect on the value of his property. He was asked what proportion of the subject lots could be developed as duplexes and he replied that it would be appropriate for 10% or whatever the proportion of duplexes in the entire Town was in 1986.

The next witness was Ronald W. Gibbons, the Director of Planning for the Town of Kentville for the past 9 years. Previously he was employed as a neighbourhood planner in the City of Dartmouth. He said that the Town's Municipal Planning Strategy (M.P.S.) was approved by the Minister of Municipal Affairs on December 5, 1980. A copy of this Plan is filed as Exhibit K-5 and is entitled "Municipal Development Plan (M.D.P.)". He said he had been involved in the drafting of this document and was also involved in all of the steps leading to the Plan's implementation. He referred to a statement on page 3 of the Plan that the ongoing development of the planning process in the Town has been that of public participation.

Mr. Gibbons pointed out that the M.P.S. at page 18 in Policy B-1 states that to co-ordinate and control the location of multiple residential dwellings, the Council has not, except for existing development, prezoned any area for multiple residential use "but instead will allow such uses by amendment to the Zoning By-law subject to the criteria established in this Plan."

Mr. Gibbons was referred to page 31 of the M.P.S. where it is stated that:

> "The continued high cost, not only of serviced lots but also of construction, has led to a decline in the housing demand in Kentville. There is a large segment of the population which cannot afford to purchase a home in Kentville, and these people are left with either one of two alternatives, to rent or to purchase property outside the Town limits. In order to address this need for cheaper housing, it is felt that semi-detached houses on individual small lots should be permitted

and encouraged."

Mr. Gibbons said that this was the case in 1980 when the Plan was approved and is still the case.

Mr. Gibbons stated that the subject lands are located in an area designated Residential (R) on the Town's Generalized Future Land-Use Map (Map No. 8). He marked the location in red on Map 8.

Mr. Gibbons was asked to state the factors he took into consideration in reviewing the subject application in the light of the criteria referred to in Policy K-4. Policy K-4 sets forth certain criteria "in addition to all other criteria for zoning amendments as set forth in various policies of this Plan". These criteria are as follows:

> "...Council shall ensure:
>
> A) That the proposal is in conformance with the intents of this Plan and with the requirements of all other Town By-laws and Regulations;
>
> B) That the proposal is not premature or inappropriate by reason of:
>
> i) The financial capability of the Town to absorb any costs relating to the development;
>
> ii) The adequacy and proximity of school, recreation and other community facilities;
>
> iii) The adequacy of road networks adjacent to, or leading to the development;
>
> iv) Adequacy of water and sanitary sewer to accommodate the proposed development;
>
> v) The potential for the contamination of water courses or the creation of erosion or sedimentation;

vi) The potential for damage to or destruction of historic buildings or sites.

C) That controls are included in the zone so as to reduce conflict between the development and any adjacent or nearby land use by reason of:

i) Type of use;

ii) Emissions including air and water pollutants and noise;

iii) Height, bulk and lot coverage of the proposed building;

iv) Traffic generation, access to and egress from the site and parking;

v) Open storage;

vi) Signs;

vii) Similar matters of planning concern.

D) Suitability and development costs of the proposed site in terms of steepness of grades, soil and geological conditions, marshes, swamps, or bogs and proximity to street intersections, railway rights of way and other nuisance factors.

E) Provision is made for buffering landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic.

F) Development is located so as not to obstruct any natural drainage channels or water courses."

Mr. Gibbons went through all these criteria and said the application in question met all of these.

Mr. Gibbons was referred to Policy K-5 which states that:

"In considering amendments to the Zoning By-law, it shall be the intention of Council to:

i) request a report from the Development Officer;

ii) refer the matter to The Planning Advisory Committee for their report with respect to any other policies of this Plan which affect the proposed amendment".

He said that he is the Development Officer as well as being the Director of Planning and he had prepared a report for the Planning Advisory Committee. A copy of his report is filed as Exhibit K-11. He said that the P.A.C. approved his recommendation to rezone but Council refused the application following a public hearing. He said that at the public hearing held by the Council concerns were raised all of which had been considered at the time he had prepared his report. These concerns related to traffic, density, land use conflicts, quietness of the neighbourhood and water and sewer matters.

Mr. Gibbons disagreed with Mr. Rivers that there would be a conflict between the proposed development of R-2 uses and any adjacent uses. He also commented that there is no provision in the Town's Land-Use By-law for contract development and he expressed the opinion that the Town did not need such a provision as he considered that conventional zoning was adequate.

On cross-examination Mr. Gibbons agreed that the predominant zoning in the most northerly portion of the Town where the subject land is located is R-1. He also agreed that the predominant use of R-2 zoning is along Belcher and Cornwallis Streets and that Belcher Street is a major arterial street that turns into a highway that leads to Port Williams. He also agreed that the other R-2 uses in the Town are "spotty and scattered".

On cross-examination, Mr. Gibbons was referred to Policy K-3 which states Council's intent not to pre-zone certain land use categories including "ii) Multi-Unit Residential". Mr. Gibbons stated his opinion that "Multi-Unit Residential" does not include duplexes.

On further cross-examination Mr. Gibbons stated that while he believed the Appellant's representative Mr. Spinney that the Appellant would not build duplexes on all of the lots in question nevertheless he considered all the lots suitable for duplex development.

In response to a question from the Board Mr. Gibbons stated that there is a very definite demand for duplex type of housing in the Town and there is very little vacant pre-zoned land which could be used for this purpose.

Marion Ross was called by Counsel for the Town. Ms. Ross has been a member of the Town Council since 1982 and was a member of the P.A.C. when it recommended to Council approval of the Appellant's application for rezoning. Ms. Ross said that she had voted in favour of recommending approval of the application at a meeting of the P.A.C. but had changed her mind and voted against approval of the application at the Council meeting. She stated that she had changed her opinion after having talked to area residents who were opposed to the rezoning application.

She was of the opinion that an R-2 zone in the middle of an R-1 zone would give rise to an incompatibility between the two zones. She expressed the view that having an R-2 zone for the subject lots would affect the quality of life for the persons in the adjoining R-1 areas because of the possibility of having twice as many dwelling units, and more automobiles, cats, dogs, clothes lines etc. She was concerned about increasing the population density in this area. She also was concerned about the fact that some dwelling units would be rented units and the appearance of these properties would not likely be kept to the same standard that would be in place if the units were all single family and owner occupied units. Ms. Ross also expressed concern about the adverse effect of increased traffic in the area and the assumption of people in the area that it would not change by reason of a change in the zoning. She considered that the rezoning of the subject lots could result in some devaluation of the surrounding R-1 lots but was unable to place a dollar value on this possible devaluation as she is not a real estate appraiser. While Ms. Ross is of the opinion that "R-2 is desperately needed in Town and there seems to be lots of people looking for R-2 types of housing" she is of the opiion that R-2 would be inappropriate for the subject site.

Ms. Doreen Taylor, another member of the P.A.C. and the Town Council was called by Counsel for the Town. She had been present at the P.A.C. meeting which had recommended approval of the application for rezoning. Like Ms. Ross she had changed her opinion and voted against the rezoning proposal. She had received a lot of calls from citizens in the subject area who opposed the rezoning and who expressed their concerns to her, some of which she thought were valid. She viewed the subject site prior to the public hearing before Council but had not done so prior to the P.A.C. meeting. She stated that while the developers had indicated they did not intend to fully develop the subject lots with duplexes she was concerned that Council would lose control of determining the numbers after a rezoning had been approved.

The final witness to testify was Dr. James Rafferty, a member of the Town Council, called by Counsel for the Town. He is not a member of the P.A.C. He voted against the proposed rezoning. He had visited the site prior to the public hearing before the Council. He opposed the rezoning on the basis that if the subject lots were rezoned R-2 as requested these lots would be incompatible with the adjacent R-1 uses. He was of the opinion that R-2 zoning "doesn't fit" in the middle of a primary residential R-1 area. He expressed the opinion that the alleged demand in the town for R-2 zoned lots had not been demonstrated. He stated that his attitude towards the proposed rezoning might be different if only a portion of the subject lands were proposed to be rezoned. He didn't think there was any need for more duplexes in Kentville as no proper studies had been carried out to confirm such an alleged need.

Counsel for the Town submitted a memorandum on the date of the hearing and filed a supplementary post-hearing submission on September 22, 1986. Counsel for the Appellant filed a post hearing submission on September 23, 1986.

This appeal having been brought pursuant to the provisions of Section 63(1)(b) of the Planning Act, the Board is obliged by virtue of s.s.(3) of Section 63 of the Planning Act to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy". To make this determination the Board, of necessity, must examine the Council's decision in refusing to approve the Appellant's application to rezone the subject lots from the Residential Single Family (R-1) Zone to the proposed Residential Two Family (R-2) Zone, in the light of the intent of the Town's M.P.S. This intent is to be ascertained by a perusal of the entire plan with emphasis on those portions of the plan which are especially relevant to the case at hand.

The Town's Municipal Planning Strategy (M.P.S.) was approved by the Minister of Municipal Affairs as a Municipal Development Plan on December 5, 1980. A copy of this Plan certified by the Town Administrator is filed as Exhibit K-5. The Town's Land-Use By-law was also approved by the Minister of Municipal Affairs on December 5, 1986, as a Zoning By-law and a copy of this By-law certified by the Town Administrator, is filed as Exhibit K-6.

The purpose and overall goal of the Plan is set forth in the Introduction Section on page 1 as follows:

> "The purpose of the Plan is to provide a framework to guide and assist Council in making decisions concerning the regulation of development and the provision of public services and facilities. In the preparation and adoption of this Plan, the Council of the Town of Kentville has taken an important step in fulfilling their responsibilities to the people of the Town.
>
> The overall goal of this Plan is to encourage future development to occur in an orderly manner which does not detract from the Town's pleasant living environment.
>
> In order to support this goal, the Plan identifies objectives of the Council for the Town, and then proceeds to establish specific policies directed towards their achievement. Council may implement these policies in several ways, as outlined in the Implementation Section of this Plan. (Section K)"

Section B of the M.P.S. is particularly relevant to the case at hand as it relates to "Residential Development". Policy B-2 in Section B states that "It shall be the intent of Council that any new residential development occur in areas indicated as residential on the Generalized Future Land-Use Map, Map 8".

The subject lands are clearly located in an area shown as "Residential" on the Generalized Future Land-Use Map No. 8 which is contained in the Town's M.P.S.

The M.P.S. does not define a multiple-unit residential development or a multi-unit residential development. Mr. Gibbons, the Town's Director of Planning who had been involved in the preparation of the M.P.S. expressed his opinion that the expression "multi-unit residential" which appears in the Town's M.P.S. in Policy B-3 as well as in Policy K-3 does not include duplexes. Initially, one would be inclined to disagree with Mr. Gibbons' opinion in this regard as the words "multi-unit residential" by themselves suggest the meaning of many units or more than one unit. Prima facie, a duplex consisting of two units would be within the meaning of "multi-unit residential". Mr. Gibbons' view however receives support from the statement in the M.P.S. on page 20 following the criteria for amending the Land-Use By-law to process new multiple-unit residential developments. This statement reads as follows:

> "The north side of the river, on the other hand, is made up of relatively new residential development consisting largely of single family units with a smaller number of two family and multiple units".

This strongly suggests a distinction between "two family" and "multiple units". In other words, multiple units for purposes of the M.P.S. mean more than two units.

It is noteworthy also that Policy K-1 of the M.P.S. sets forth certain zones to be initially included in the Town's Zoning By-law. These zones include four categories of residential zones, namely:

R-1	Residential Single Family;
R-2	Residential Two Family;
R-3	Residential Multiple Family;
R-4	Residential Rural.

All four of these residential zones have in fact been included in the Town's Zoning By-law (Section 2.1 in Part 2). The

Board is therefore inclined to agree with Mr. Gibbons in his interpretation that "duplexes" are not included in the expression "multi-unit residential".

If "duplexes" are included in the expression "multiple unit residential" then the criteria set forth in Policy B-3 for amending the Land-Use By-law would have to be invoked in addition to the criteria set forth in Policy K-4.

Policy B-3 reads as follows:

> "It shall be the intent of Council to process new multiple unit residential development proposals by amending the By-law subject to the following criteria:
>
> i) The multi-unit residential development shall be serviced by municipal sanitary sewer and water;
>
> ii) The municipal sanitary sewer system is of adequate size to carry the increased flow;
>
> iii) The use shall be compatible with adjacent uses;
>
> iv) The use shall have access to a public street or road that is capable of accommodating the increased traffic generated by the multi-unit residential development. The traffic generated by the new use must not interfere or negatively impact the existing residential development on local streets. In general this means that multi-unit residential developments should not be located at the end of a dead end street that has developed for single family uses;
>
> v) The site of the proposed multi-unit residential development shall be large enough to accommodate sufficient parking and recreation areas so that the development would not interfere with the quiet enjoyment of neighbouring residents;
>
> vi) Multi-unit residential developments designed for senior citizens should be located as close

> as possible to the Town's commercial and institutional facilities (See Policy B-4);
>
> vii) Any other criteria that council may from time to time, determine is necessary to properly assess the impact of the proposed multi-unit residential development on the community."

The proposed rezoning to permit R-2 development might have difficulty in complying with criteria (iii) and (v). If the proposed R-2 use which includes duplexes may reasonably be said not to be compatible with the adjacent R-1 uses then the amendment to the Land-Use By-law should be denied if Policy B-3 is relevant. Furthermore, if the proposed development may reasonably be said to interfere with the "quiet enjoyment of neighbouring residents" then it offends criteria (v) and for this reason the amendment should be denied, if of course, Policy B-3 is relevant.

The Board on balance agrees with Mr. Gibbons that "multi-unit residential" as that expression appears in the M.P.S. does not include "duplexes" and therefore the criteria set out in Policy B-3 do not apply to the case at hand.

The M.P.S. specifically states in Policy K-3 at page 95 that it shall be the intent of the Council not to prezone certain land use categories including "multi-unit residential". This intent would therefore appear not to be relevant to the proposed rezoning of the subject lots to R-2 Zone.

Amendments to the Land-Use By-law of the Town are governed by Policy K-4 of the M.P.S. set out on pages

95, 96 and 97 as follows:

> "In addition to all other criteria for zoning amendments as set out in various policies of this plan, council shall ensure:
>
> A) That the proposal is in conformance with the intents of this plan and with the requirements of all other Town By-laws and regulations;
>
> B) That the proposal is not premature or inappropriate by reason of:
>
> i) The financial capability of the Town to absorb any costs relating to the development;
>
> ii) The adequacy and proximity of school, recreation and other community facilities;
>
> iii) The adequacy of road networks adjacent to, or leading to the development;
>
> iv) Adequacy of water and sanitary sewer to accommodate the proposed development;
>
> v) The potential for the contamination of water courses or the creation of erosion or sedimentation;
>
> vi) The potential for damage to or destruction of historic buildings or sites.
>
> C) That controls are included in the zone so as to reduce conflict between the development and any adjacent or nearby land use by reason of:
>
> i) Type of use;
>
> ii) Emissions including air and water pollutants and noise;
>
> iii) Height, bulk and lot coverage of the proposed building;
>
> iv) Traffic generation, access to and egress from the site and parking;
>
> v) Open storage;
>
> vi) Signs;
>
> vii) Similar matters of planning concern.

> D) Suitability and development costs of the proposed site in terms of steepness of grades, soil and geological conditions, marshes, swamps, or bogs and proximity to street intersections, railway rights of way and other nuisance factors.
>
> E) Provision is made for buffering landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic.
>
> F) Development is located so as not to obstruct any natural drainage channels or water courses."

It is to be noted from a coloured zoning map filed as Exhibit K-13 that the subject property is located in the northeast portion of the Town in an area bounded on the south by James Street, on the east by Campbell Road, on the west by Oakdene Avenue, and on the north by the Municipality of the County of Kings. This entire area of land is zoned R-1 and is shown coloured in yellow on Exhibit K-13. The only vehicular access to the subject lots is by way of Sherry Avenue running north from James Street and from Challenger Drive which runs east from Oakdene Avenue and joins Sherry Avenue.

If the rezoning of the subject lots to R-2 takes place these lots would be bounded by R-1 zoned lots on the east, by R-1 zoned lots on the south, by R-1 zoned lots and a parcel of land designated as P-1 on the subdivision plan filed as Exhibit K-12 on the west.

The Town's position is that the proposed R-2 Zone for the subject lots would allow for the construction of duplexes on these lots and this use would be inconsistent with the adjacent single family use.

Since this appeal is brought by the Appellant in its capacity as an applicant pursuant to the provisions of Section 63(1) of the Planning Act, the Board is governed by s.s.(3) of Section 63 which requires the Board to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy". The Board may then either confirm the decision of the Council or allow the appeal by instructing the Council to amend the By-law "in the manner prescribed by the Board" as provided for in s.s.(4) of Section 63. The Board is restricted in making a decision by virtue of s.s. (5) of Section 63 in that "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy".

The Board agrees with the contention of the Town that the Appellant has the burden of showing that the Council's decision cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

In the memorandum filed with the Board by Counsel for the Town at the commencement of the hearing the Town submits that "this application does not relate to a multiple unit residential development as that term is used in the municipal development plan. That term, it is suggested, refers to developments included in R-3 Zones." The Town therefore, agrees with the opinion of Mr. Gibbons, the Director of Planning, on this point and this opinion has been adopted by the Board.

The Town's memorandum at pages 8, 9 and 10 states as follows:

> "12. It is submitted that the predominate land use in northern Kentville (all lands north of the Cornwallis River) is R-1 (single family dwellings)0 The R-2 and R-3 uses are scattered throughout this area in small parcels except along arterial and collector roads. This should be compared to the proposed 8.3 acre parcel the Appellant wishes to rezone.
>
> 13. If the application is granted, it is submitted, that a large "selected" area of two family dwellings could be created. Although the Appellants apparently do not necessarily intend to construct two family dwellings on all of the lots, there is no sufficient control in the present R-2 zoning to prohibit the land, after rezoning, to be entirely constructed of two family dwellings. The Appellant is bound only to meet the minimum requirements of the R-2 zoning. The Municipal Development Plan does not permit development agreements in this situation.
>
> 14. The Municipal Development Strategy is generally silent about R-2 use although it speaks of multiple unit residential (Policy B-2). However, it is submitted that the Municipal Development Plan does not anticipate a dedicated area of this size for R-2 use not located on a collector or arterial roads.
>
> 15. A general review of the Town's zoning does not indicate large areas of R-2 use of this nature. R-2 use is found generally along major arterial and collector roads except in the areas of Town which have older homes and where government subsidized housing exists (see south end of Prospect Street). The proposed area would be served by an extension of Sherry Avenue, extending north from James Street to exit onto Oakdene Avenue and a short extension of Smith Avenue. As these are both local streets, it is submitted, that the use which these local streets serve should be compatible and consistent with the immediate surrounding area which is almost entirely composed of single family dwellings.
>
> 16. Notwithstanding that R-1 and R-2 use relate

> generally to residential use, it is submitted that these zones are not necessarily compatible. The Municipal Development Plan and the Zoning By-law recognize two distinct zones of R-1 and R-2. There is not one zone but two zones. Because the lot size and other requirements between R-1 and R-2 are the same, therefore, there would exist obvious difference in the 'flavour' of the respective uses notwithstanding that both were residential for no other reason than twice as many families would be occupying the same land.
>
> 17. The area in question is not an otherwise 'undeveloped' area of the community, nor is it located in a 'holding zone'. It is, rather, a part of an existing community and should, therefore, it is submitted, have a use which is consistent with and therefore compatible with the present existing single family dwelling use."

The Town's Memorandum refers to criteria E of Policy K-4 which states that in addition to all other criteria for zoning amendments, Council shall ensure that:

> "Provision is made for buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic. The memorandum then states at page 11 that ...'Council are not able through the present R-2 zoning requirements to ensure that provision is made for buffering to reduce potential incompatibility between the existing R-1 uses and the proposed R-2 use. It is submitted that this Policy is designed to ensure that Council attempt to separate the incompatible zones, which, it is submitted, is not possible here. It is submitted that Appellant's application for rezoning is inconsistent with this Policy of the Municipal Development Plan, in this regard."

The final point made in the memorandum submitted by the Town is that the citizens of the area "relied on the present zoning when they chose to reside in this area and that the continuation of the R-1 zoning into the area in question should not be changed without compelling reasons. They see the land in question as a natural extension of their immediate community and they feel that it should be developed in a like manner".

Counsel for the Town submitted a post-hearing memorandum as a supplement to the Town's other memorandum. The following is an extract from the Town's supplementary submission:

> "1. The Municipal Development Plan is generally silent with respect to R-2 zones and, in particular, with respect to rezoning to R-2. The Plan does however deal with rezoning to R-3 (See Policy B-3). Policy K-4 deals with rezoning generally. The Town submits that Policy B-3 does not apply in this matter. Policy K-4 appears to contemplate that other criteria will be applicable in rezoning applications. It appears that no other criteria in the policy is applicable in this situation. It is submitted, therefore, that the Plan does not contemplate rezoning from R-1 to R-2 of this nature, that is, of areas this large. It is submitted that the Plan anticipates that R-2 development in the Town of Kentville be made gradually in older areas of the Town or integrated slowly into newer developments. Larger or dedicated areas of R-2 use should only be created for "special" purposes, that is, low cost housing, senior citizens, etc. The Town of Kentville is generally comprised of single family dwellings and the development of duplexes or two-family dwellings has been made on an intermittent basis generally. It is submitted, therefore, that the Counsel's decision not to rezone the land in question from R-2 is consistent with the intent of the Municipal Development Plan.
>
> 2. A great deal of evidence was given at the hearing with respect to 'incapatability' and 'conflict'. Mr. Gibbons, the Town's Development Officer, said that there would never be incapability between R-1 and R-2 use. It is submitted that this opinion defeats the purpose of having these two types of zones. The residents of the Town, through its counsel, wanted two residential zones, namely single family and two family. One of the purposes of zoning as indicated in the Town's memorandum, is to segregate or separate land uses. Therefore the 'incapability' must be defined in context. The incapability in the

> instant case is, of course, that R-1 has one family per dwelling and R-2 has two families per dewelling. This inherent difference is the 'conflict'. This may seem trite, but it is the By-law that created these two residential zones. Therefore, it is not enough to say that because both zones relate to residential use that there is never incapability.
>
> If Mr. Gibbons is correct, every rezoning from R-1 to R-2 would be granted. This, is is submitted, cannot be consistent with the Plan. It is suggested that the measure of the incapability or the conflict must be measured by the extensiveness of the conflicting use, (in this case R-2). If for example, a small areas was proposed to be rezoned, the conflict or incapability may not exist or be reduced to a minimum. Here, however, the proposed development is 8.3 acres and is large in comparison with the surrounding areas. It is submitted that if the proposal is allowed to proceed, the existing neighbourhood would be altered in character significantly. As the present zoning By-Law exists, there is no possiblity to 'reduce the conflict' (see Policy K-4(c))."

Counsel for the Appellant filed a post hearing submission received by the Board on September 23, 1986. The following are extracts from this submission:

> "5. In the Municipal Planning Strategy of the Town of Kentville there is no detailed statement of the intent of the Strategy in providing for a residential two family zone (R-2). Nor is there any specific statement of the circumstances under which R-2 zoning is to be encouraged or preferred. It is submitted that Policy B-3 (p. 18) of the Municipal Planning Strategy does not apply to the subject application but rather to residential multiple family (R-3) zoning".
>
> "16. It is submitted that a significant consideration in this appeal is how far afield from the subject lands one may reasonably go in evaluating the affect on any adjacent or nearly land use as directed by Policy K-4 paragraph C. If the area to be considered is limited to the single family dwelling properties physically adjacent to the subject land the conclusions reached under Policy K-4 may differ significantly from those one would reach if a broader area were considered including the apartment buildings, duplexes and

the Christian Reform Church (approved for an R-2 Zone) located in the general area".

"17. It is submitted that to limit the consideration to the single family dwelling properties adjacent to the subject property is too restrictive. Policy K-4(c) refers as well to 'nearby land'. It is further submitted that good planning strategy requires that this broader view be taken. As indicated in Mr. Gibbons' Planning and Development Report (Exhibit K-11) 'the property will provide a transitorial zone between the R-1, R-2 and R-3 uses on Oakdene Avenue and the R-1 uses on Campbell Road and James Street."

"18. As the Director of Planning and Development Mr. Gibbons considered all of the factors set out in Policy K-4 of the Municipal Planning Strategy and considered all of the applicable provisions of the Zoning By-law and concluded that the subject proposal complied with the intent of the Municipal Planning Strategy and met the requirements of the Zoning By-law. He indicated specifically that there is no incompatibility between the present type of use and the proposed development nor any incompatibility where similar matters of planning are concerned. He indicated that this proposal was consistent with the intent of the Municipal Planning Strategy in that a developer with a block of land has proposed a use contemplated by the plan. Since there is no pre-zoned R-2 area in which such a development can take place Council is able to control such a development by either satisfying itself that the proposed development conforms with the Municipal Planning Strategy's intent and the zoning by-law and by approving the rezoning application or by refusing the application or amending the zoning by-law if it is satisfied that the Strategy's intent and the zoning by-law's requirements are not met."

"19. Evidence was given by three Council members and by Mr. Rivers, a Planner with the Municipality of the County of Kings. The objections identified in the evidence included the following:

1) Density of use - Mr. Rivers indicated that allowing a high-density use in a low-density area would not meet the Municipal Planning Strategy goal of a 'pleasant living environment'. He indicated that this objection fell under policy K-4(c)(i) and (vii).

2) Possible drop in value of neighboring properties - opinions were expressed by three of the four opposing witnesses that there might be a drop in the value of the adjoining properties, but there was no evidence before the Board that such a devaluation would in fact take place if the subject property were rezoned to R-2.

3) Numbers - Mrs. Ross and Mrs. Taylor both indicated that R-2 zoning would permit more people, more cars, more children and more traffic. Mrs. Taylor suggested that there would be increased noise and Mrs. Ross stated that the appearance of the dwellings in an R-2 zone may deteriorate if the dwelling is not owner-occupied.

4) 'R-2 Doesn't Fit' - this objection may relate to Mr. Rivers 'density of use'. Two of the other witnesses indicated that such a large R-2 area was incompatible with an R-1 use area."

"20. It is acknowledged that each of the objections raised by the witnesses has merit. However in considering the application to re-zone specific reference must be made to policy K-4. It is submitted that the objections would fall under policy K-4 paragraph c(i) or (vii) or under paragraph E. It is submitted that to support a refusal of the subject application to rezone the objections raised must amount to a conflict between the development and the nearby land use."

"21. It is submitted that the nearby land use includes the duplexes and apartment buildings in the surrounding area to the east and west of the subject property. In considering that area it is submitted that traffic and numbers of people would not create a conflict. Further it is submitted that the density of this proposed development is consistent with the density in that surrounding area. With respect to the suggestion that property values in the area may decrease it is significant to note that the minimum building requirements in the R-1 zone are established by the 1980 National Building Code. It would be possible for owners of lots in the area in question to build minimum cost houses which, it is submitted, may very well have these same property devaluation affect on the adjoining land owners. On the other hand dwellings of the sort built by Mr. Hanna on one of the lots in the land in question would not likely have any negative affect on prices in the area."

> "24. In summary it is submitted on behalf of the Appellant that the Municipal Planning Strategy does encourage new R-2 Development (not limited to existing dwellings), that in the absence of provision for a special development agreement a rezoning is necessary, there being insufficient vacant land presently zoned R-2. It is further submitted that in analysing Policy K-4 of the Municipal Planning Strategy the proposed rezoning would not result in any significant conflict between the subject property and nearby land use. It is therefore submitted that the decision of Council to refuse the rezoning application cannot reasonably be said to carry out the intent of the Municipal Planning Strategy and that the appeal ought therefor to be allowed."

In the Board's opinion the purpose of zoning is to create compatibility and stability in the use of land. The Town's M.P.S. states at page 93 that the "principal mechanism by which land use policies are implemented is the Zoning By-law." In the case at hand while there was no conclusive evidence that there would be an injurious effect upon the single family dwellings in the neighbourhood of the subject lots, there was evidence given by the three Councillors and by Mr. Rivers, the Planner, that the rezoning followed by the construction of duplexes is likely to have an adverse effect on the single family dwellings in the area. If the use and enjoyment of the single family homes may be affected by the requested rezoning it is a matter which should be given careful consideration by the Board.

It is obvious that decisions involving applications for amendments to land-use by-laws should be made in an orderly and systematic manner and, where there is a municipal planning strategy in effect, the decisions must reasonably carry out the intent of the strategy.

It is the Board's opinion that Council as well as the Board should be concerned with maintaining the integrity of the land-use by-laws so as to create some degree of confidence in the planning process. This is not to say that the land-use by-law should never be changed. On the contrary, the M.P.S. at page 95 contemplated that "from time to time, it will be necessary to amend the Zoning By-law". Policy K-4 sets out certain criteria which must be followed by the Council in addition to "all other criteria for zoning amendments as set out in various policies" of the M.P.S. before the Council may approve an amendment to the Land-Use By-law.

Mr. Gibbons testified that in his opinion, the proposed rezoning meets all of the required criteria. Mr. Gibbons is a planner with many years experience in municipal planning matters and his planning opinions should be given some considerable weight. The Board, in this case, is in disagreement with the opinion expressed by Mr. Gibbons that the proposed rezoning meets all of the criteria set forth in the Town's M.P.S. The Board is of the opinion that a potential conflict arises between the proposed development of R-2 uses in the form of duplexes and the existing R-1 uses on the west side of Campbell Road, on the east side of Oakdene Avenue and on both sides of that portion of Sherry Avenue located in the Burmont subdivision immediately south of the subject lots.

This potential conflict or incompatibility might be reduced if there were adequate controls included in the R-2 Zone designed for the purpose of reducing the conflict as is contemplated by Policy K-4(c). Furthermore, no provision is made for "buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent R-1 land uses and traffic", as is stated in criteria (E) of Policy K-4.

The Board is of the opinion that the owners of the properties zoned R-1 situate on three sides of the subject lots have the right to expect the Town Council not to rezone immediately adjacent lands also zoned R-1 to a higher density use such as R-2 Zone unless the rezoning is clearly within the intent of the Town's M.P.S. It is the opinion of the Board from the evidence adduced and from a view of the subject site and immediately surrounding lands that the proposed rezoning is not within the intent of the M.P.S. The Board pursuant to Section 63(3) of the Planning Act determines that the Council's decision reasonably carries out the intent of the M.P.S.

The Board is of the further opinion that the Appellant has not established pursuant to Section 63(7) of the Planning Act that as an applicant for a rezoning it would "suffer undue hardship" by reason of the Council's decision or that "extraordinary and compelling circumstances are present".

The Board therefore, pursuant to Section 63(4) of the Planning Act confirms the decision of the Council and the appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of November, A.D., 1986.

RHBlois

R.H. BLOIS,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

Mehta v. Town of Truro

PLANNING--DEVELOPMENT PERMIT--REFUSAL TO PERMIT CONSTRUCTION AND USE OF APPLICANT'S PROPERTY AS DOCTOR'S OFFICE, COMPUTER STORE AND RESIDENTIAL ROOMS AND RELATED ON-SITE PARKING--TIME WITHIN WHICH TO APPEAL--WHETHER PERMIT WOULD BE INCONSISTENT WITH LAND-USE BY-LAW--WHETHER SUFFICIENT INFORMATION TO ENABLE CONSISTENCY TO BE DETERMINED--MUNICIPAL BOARD ACT, SS. 16(1), 29--PLANNING ACT, SS. 40, 41, 42, 43, 51, 52, 53, 54, 77(4),(5), 78(1),(2),(3)--TOWN OF TRURO LAND-USE BY-LAW, SS. 1, 2.3, 3.3, 3.4, 4.1, 4.15, 5.1, 9.1, 10.1--TOWN OF TRURO MPS POLICIES P-313, P-314, P-318, P-319

This is an appeal from a decision of the Town of Truro's development officer refusing the Appellant's application for a development permit. The ground floor of the subject building is presently occupied by the Appellant's medical practice and a computer store owned by a corporation of his wife's. The Appellant proposes to use the unoccupied second floor as a rooming house and to provide on-site parking spaces surrounding the building.

HELD: The Board confirms the decision of the development officer. The appeal is dismissed.

From the correspondence and dealings between the Appellant and his solicitor and the development officer and the Town's solicitor, it is difficult to say as a jurisdictional matter that the refusal and time requirements of s. 78(1) of the Planning Act have been met. However, the development officer was of the opinion expressed in a letter that there was an outstanding application that was refused by him on March 19, 1986. The Appellant received the letter on March 21 and filed his Notice of Appeal on April 4, within the 15 day period. Despite complaints by the Appellant concerning his treatment by the development officer, the Board's duty in this matter, as spelled out in s. 78 of the Planning Act, is to decide if the permit, when granted, would be inconsistent with the Land-Use By-law. The first step before doing this is to see if there is sufficient information to enable the project to be defined and so tested for consistency. Here the application lacks the sufficiency of information required by the Land-Use By-law itself, at least in not having accompanying plans drawn to an appropriate scale and in the Applicant not attending as often as necessary on the development officer to allow him to determine optional information requirements. The project proposed is also inconsistent with the Land-Use By-law, at least in that it would permit parking in yards where it is prohibited and, if the parking spaces were deleted then the project would not have the on-site parking spaces required for the proposed uses. A minor variance is a possible alternative, but the Board cannot deal with this.

Note

Dr. Mehta applied for leave to appeal the Board's decision. The Town applied to the Appeal Division of the Supreme Court to quash the application and the Court granted the Town's application. (See S.C.A. No. 01726).

NSMB-516-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by DR. NAVIN M. MEHTA of Truro, from the decision of Peter Nelson the Development Officer of the TOWN OF TRURO, made on March 19th, 1986 refusing the Appellant's application for a Development Permit respecting his property at 248 Willow Street Truro, to permit DR. MEHTA, to construct and use on his property a doctor's office, a computer store and residential rooms and related on-site parking facilities.

BEFORE: RICHARD L. WELDON, Member

COUNSEL: DR. NAVIN M. MEHTA, Appellant, on his own behalf;

DAVID W. GRUCHY, Q.C., on behalf of the Town of Truro.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's September 4,1986 sittings at the auditorium of the Colchester Regional Library, Truro, N.S. [The Town of Truro will hereinafter be referred to as the Town].

The Notice of Appeal, dated April 3, 1986, was served by the Appellant on the Board April 4, 1986 pursuant to Section 78(2) of the Planning Act, S.N.S. 1983, Chapter 9. The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman decided the Notice complied with the Planning Act, and the Rules made thereunder. The Appellant undertook to pay the costs of advertising the Notice of Hearing.

The Appeal seeks to have the Board reverse the decision of the Town's development officer, Peter Nelson. The Appellant, Dr. Navin M. Mehta alleges that the decision was made March 19, 1986 and that decision refused his application for a development permit for a building he owns located at 248 Willow Street in Truro. The building is presently occupied partly as a doctor's office for Dr. Mehta's medical practice, and partly as a computer store owned by a corporation of his wife's, both located on the ground floor. The second floor is presently unoccupied but the Appellant proposes to use it for a rooming house. The development permit application also contemplated the provision of on-site parking spaces surrounding the building as would be permitted and required by the uses requested in the development permit application.

In September, Dr. Mehta, in relation to 248 Willow Street had two pending applications for building permits one for renovations to the building and one for construction of a parking lot as well as the instant application for a development permit. At a time prior to the hearing of this appeal, the building permit for the renovations had been granted and the development officer had withdrawn his original demand for a building permit to authorize the construction of the parking lot having latterly decided that no such authorization was required.

The appeal came on for hearing at 10:00 A.M. on

September 4, 1986 at the auditorium pursuant to the Notice of Hearing dated the 5th day of August, A.D., 1986 and the Board heard evidence for two days and took (unaccompanied by any party) a view of the site after the 4:30 P.M. adjournment of the second day of the hearing.

Service of the Notice of Hearing, and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board. The Affidavit of Service presented by Dr. Mehta was incomplete but his explanation of the techniques he used to determine the persons to be served with Notice of Hearing proved he had served the persons required by the Board to be served.

Dr. Mehta, in his opening remarks, strayed somewhat into the field of evidence. His remarks will be summarized at some length here. They will be set out in as great a detail as necessary in the comments of the evidence made later in this decision. Suffice it to say that Dr. Mehta contends that he purchased for his purposes 248 Willow Street after consultation with Town officials including Mr. Nelson and that he only completed his purchase after he had obtained from Town Council, as advised by Mr. Nelson, a rezoning of 248 Willow Street from its previous zoning of R-2 (a residential zone) to C-2 (a Highway Commercial zone). He then said he occupied 248 Willow Street as set out above and started to renovate it for those uses. Mr. Nelson then instructed him to cease work and to apply for a development permit and a building permit. Dr. Mehta contends that, again advised by Mr. Nelson, he attended at Mr. Nelson's office and signed an application for these permits and then gave Mr. Nelson adequate information to process the joint applications mentioned above. The development permit was never granted and, according to Dr. Mehta, the building permit was not granted in time to complete the work before winter weather conditions prevented the completion of outside construction. The building work permitted was left incomplete, according to the Appellant, since he does not know whether or not to complete the work pending the outcome of this appeal. Dr. Mehta contends that he would not have made the purchase, applied to rezone the land, commenced work on the building, occupied the building, except as he had been advised by Mr. Nelson or someone in his department how and what to do. According to Dr. Mehta, the March 19, 1986 refusal of his application for a development permit flew in the face of the advice and encouragement he had been given by Mr. Nelson and Town Council over the year prior to refusal. Dr. Mehta argues that his proposal is in full accord with the Town's Municipal Planning Strategy (MPS) and therefore the refusal is contrary to that strategy and this Board should therefore allow his appeal and order that he be granted his development permit.

Mr. Gruchy outlined the Town's position in his opening remarks as follows:

1. If there had been a refusal, the refusal had occurred in September 1986 and the present appeal, whatever its merits, had not been

filed within the prescribed time and therefore the Board had no jurisdiction to hear the appeal.

2. That there had never been a refusal of a development permit to Dr. Mehta since the Appellant had never provided adequate information to the development officer as required by the MPS and the Town's Land Use By-law and therefore the development officer could not process the application tendered him and therefore had to reject the application. He further submitted that the Appellant could at any time apply to the development officer again for a development permit and it would likely be granted on the basis of past information once the information required was formally presented in a fresh application on the prescribed form to the development officer. The only portion of the premises that would be permitted development would be the uses for the first floor of the building since under the Land Use By-law's requirements for the parking buffering for residential zones adjacent both to the North and South of 248 Willow Street essentially prevented on-site parking at that location if the premises were used for a rooming house. Mr. Gruchy contends that all Dr. Mehta has to do is to apply again and he would likely receive the permit required. Mr. Gruchy submitted that the crux of the dispute is purely and simply one of parking space and where it will be located on the premises.

Dr. Mehta said he had made all the applications he was by law required to and all the applications he intended to, that there was "no appropriate form required" for any necessary application and that his previous application was current and in time for this appeal. He argued that the Town had all the information it needed from him and this appeal was taken to enforce the planning law as Dr. Mehta contends it exists. He had made an honest attempt to cooperate with the Town officials, he now believed that he could go no further and it was up to them to cooperate with him and up to this Board to enforce their compliance with the law.

All parties present at the hearing agreed that, as a dissatisfied Applicant, the Appellant had a right to appeal herein provided his Notice of Appeal was filed within the required time. Subject to that proviso, the Board would have jurisdiction to hear the appeal pursuant to Section 78(1) of the Planning Act being c.9 S.N.S. 1983.

Without the March 19, 1986 letter of Mr. Peter Nelson set out essentially in full elsewhere in this decision, the Board would have been hard pressed to find a decision of a development officer made within the statutory time to give rise to a timely appeal to this Board by the present Appellant.

These Planning Act sections bearing on this jurisdictional aspect of this appeal bear quoting here:

> "77(4) Within fifteen days of receiving an application for a municipal development permit, the municipal development officer shall inform the applicant whether or not his application is complete.
>
> (5) Within thirty days of receiving a completed application, the municipal development officer shall either grant the municipal development permit or inform the applicant of the reasons for not granting the permit.
>
> 78(1) The refusal by a municipal development officer to issue a municipal development permit may be appealed by the applicant therefor.
>
> (2) A notice of appeal shall be served on the Board within 15 days of the date that the written decision of the municipal development officer is served on the applicant."

Dr. Mehta first applied for a municipal development permit on September 19, 1985 (Exhibit M5 tab 2) [all subsequent "tab" references will be to the tabs of Exhibit M5]. This permit application was apparently rejected in writing by Mr. Nelson by letter of September 20, 1985 (tab 3). This was well within the time prescribed by the Planning Act for the development officer to review and reject the application. There is no evidence spelling out exactly when this rejection was served on Dr. Mehta but Dr. Mehta was aware of this rejection not later than October 7, 1985. This rejection was not appealed to the Board within 15 days of the service of the decision on Dr. Mehta (see the doctor's letter to Town Council tab 4). Mr. Gruchy's report to Town Council dated October 16, 1985 (tab 9) is factually accurate in that it agrees with the evidence adduced at the hearing but it is silent as to his then opinion of the validity or even existence of the rejection decision spelled out in tab 3. By November 19, 1985, Mr. Nelson (tab 10) is talking about "applications for building and development permits which you have made". The only application for development permit that had been made to this time in writing had already been rejected. The phrase quoted above is in strict analysis grammatically accurate but could be misleading to the average reader as the whole of tab 10, unless read with the greatest of care, would tend to give the impression that a valid application for a development permit was still outstanding.

By November 29, 1985 Mr. Nelson is requesting Town Council "to instruct the solicitor to take legal action as this is a violation of Section 3 of the Land Use By-law". (tab 17).

On December 2, 1985 (tab 18) Douglas Caldwell Barrister, on behalf of Dr. Mehta delivered a letter to the development officer purporting to apply for a development permit.

On December 9, 1985 (tab 20) Mr. Nelson briefed Mr. Gruchy on the up-to-date state of the Mehta matter at 248 Willow Street. In that briefing he refers to his September 20 letter to Dr. Mehta but makes no mention that it was a refusal decision. Indeed he refers to application #249-85 "this is the principal application ..... I think we should keep this on hold until such time as the applicant has shown compliance with the appropriate by-laws". In the face of the time constraints in the Planning Act within which he must make his decisions [a maximum of 45 days from September 19, 1985 set out above] and in the face of his decision previously made to reject that application [which would have the effect in this case of reducing this 45 day maximum], the Board is unable to see how Mr. Nelson had any further power on December 9, 1985 to deal with permit application #249-85. Yet that is exactly what he purported to do.

If he treated application #249-85 as being renewed by the Caldwell letter of December 2, 1985, then, of course, he still had power to deal with this renewed application as it was still within the time limits defined in the Planning Act. In a letter to Mr. Caldwell dated December 11, 1985, (tab 21), Mr. Nelson expressly rejects that December 2nd letter as a valid application for a development permit. Mr. Nelson appears in this December 11 letter to be continuing with the processing of a development permit application.

By December 17, 1985, Dr. Mehta, through his Solicitor, seems to accept the fact that a fresh application for development permit was required (see tab 24) since he requested of Mr. Nelson "... the appropriate application forms....". On December 17 (tab 25) Mr. Nelson insists"..... the applicant must apply at this office....". At this date Mr. Nelson seems to feel that there is no outstanding application for a development permit.

What changed his mind again by March 19, 1986? (See tab 30 quoted extensively elsewhere in this decision). A copy of the letter in tab 30 was served on Dr. Mehta and his appeal to this Board was within time-provided tab 30 was the decision of the development officer made on an application for a permit. If the permit is required to be in writing all written applications at one time or another since

September 1985 had apparently been rejected prior to any time which would support an appeal to the Board. The Land-Use By-law requires that the application for a development permit be in duplicate [s 3.4(a)]. The application must be signed [s. 3.4(b)]. It does therefore imply writing as the appropriate form of duplicate communication.

Although the form of the development permit is prescribed [s. 3.3(b)], the form of the application for a development permit is not prescribed. The form of application for development permit generally used in the Town is the Schedule B of the Land-use By-law referred to in s. 3.3(b) supra which has two titles "Development Permit" and "Application for Building Permit". Nowhere on its face does it have the title "Application for Development Permit". Further the form does not require answers to all the requirements the development officer may choose to put to an applicant under s. 3.4(a) and (b) of the Land Use By-law. Thus the Board can only conclude that an application for a development permit in the Town need be in writing, signed, but on no particular form. It need contain, if there is no specific request for information by the development officer of the applicant, only the minimum information required under those two cited sections.

From the mass of conflicting writings set out in some detail herein, and ignoring for the moment the effect if any of tab 30, the Board is at first unable to say whether or not the Appellant has satisfied his burden of proving, as a jurisdictional matter, that the decision of the development officer of March 19 purporting to refuse him his development permit application was the type of refusal required by s.78(1) of the Planning Act. On March 19, 1986, Mr. Nelson, having full access to all the relevant documents, being knowledgeable of the Land Use By-law of the Town and of the Town's MPS, having access to experienced counsel for advice in municipal and planning law, thought there was, in fact, an outstanding application for a development permit signed and in writing. The Board, agrees with this opinion of the development officer that there was an outstanding application on March 19, 1986 which was refused by him on that date. The Appellant received notice of the development officer's refusal not before March 21, 1986 and therefore the Appellant's Notice of Appeal dated April 3, 1986 and filed with the Board on April 4, 1986 is within the 15 day appeal period set out in s.78(2) of the Planning Act. The Board therefore assumed jurisdiction to hear this appeal.

The Appellant called as witnesses himself, Jean Wilson, his wife and business associate Ina Mehta, Douglas Taylor, Peter Nelson, Michael Shipley, the Mehta's daughter Sukesha Mehta and Juanita Atkinson.

Dr. Mehta testified on affirmation. He is a medical doctor living at 195 Burnyeat Street, Truro. In April 1985 Dr. Mehta started looking for places of business for himself and for his wife as outlined above. Those businesses were then located in the Fundy Mall in inadequate space and there was too much exposure to non-productive walk-in inquiries for the computer business. Dr. Mehta first looked at 444 Prince Street in the Town which was physically suitable for these purposes. He signed an agreement of sale for that property. Then he contacted Mr. Nelson who indicated to the doctor that 444 Prince Street was zoned R-2. Mr. Nelson would not recommend its rezoning for commercial use. Mr. Nelson said however, that Dr. Mehta was free to apply to Town Council to rezone 444 Prince Street regardless. Dr. Mehta applied to Town Council for such rezoning but before Town Council could deal with his application he discovered another property for sale suitable for his purposes located at 248 Willow Street, Mr. Nelson, when again contacted by Dr. Mehta, advised that 248 Willow Street was presently zoned R-2 but was shown as Commercial on the future land use map of the Town. Mr. Nelson informed the witness that Dr. Mehta would have to rezone 248 Willow Street to C-2 before the property could be put to its desired use. Dr. Mehta then changed his Prince Street application to rezone to an application to rezone 248 Willow Street. Town Council rezoned 248 Willow Street to C-2. First the application was considered by the Planning Advisory Committee of the Town (PAC) in June, 1985. Dr. Mehta testified that the parking requirements for his proposed development were discussed even at this early stage. On Mr. Nelson's advice the PAC recommended the rezoning to Town Council which in August, 1985 approved the rezoning. Dr. Mehta "let go my [his] option ... on .... Prince Street ...". Dr. Mehta says he was advised that he had to wait 15 days for an appeal period to pass after the rezoning before he could use 248 Willow Street for a commercial use.

Dr. Mehta waited the 15 days and both he and his wife moved their businesses into 248 Willow Street on or about September 4, 1985. They put new carpet in the building and stripped the front siding off the building in preparation for applying new siding and new front doors and they had dug up the front yard in preparation for the installation of proper parking facilities in concrete. On September 19, 1985 Mr. Nelson told him to stop work and then repeated the instructions to stop in a letter which he delivered to Dr. Mehta.

At the same time, Mr. Nelson asked Dr. Mehta to come into the development office to fill out the application for a building permit and a development permit. That same afternoon Dr. Mehta attended at the development office, met Mr. Nelson, and made out, at the direction of Mr. Shipley of that office, an application on a form produced by Mr. Shipley.

On September 20, 1985, Dr. Mehta received a letter from Mr. Nelson (tab 2) and since the letter may have some degree of significance the Board pauses here to quote the operative parts of the latter:

> "Re: Building and development permit Application, 248 Willow Street
>
> I have received your application for the above Development and have found the following deficiencies. building permit [numerous objections are made to the content of the application as those contents relate to the granting of a building permit. The Board is not concerned with the detail of those objections in this appeal]... development permit - This permit application has been reviewed and you have insufficient lands for parking as required by the land-use by-law, Town of Truro. (see attached parking calculations). I am therefore refusing

this application for development approval.

Yours truly,

Town of Truro
(sgd) Peter Nelson
P.A. Nelson
for Authority Having Jurisdiction...Ground floor uses: .... required four parking spaces.... Second floor uses:...required four parking spaces...

TOTAL PARKING SPACES REQUIRED EIGHT (8)

2. Site

The Applicant supplied two parking plans ... both plans are unacceptable for the following reasons.

1) Fail to meet the requirements of Section 9.1(c) of the Land-use By-law. 9.1(c) 'No parking space shall be permitted in an abutting yard within 6.1m of a side or rear lot line in the commercial zone'

2) Fail to provide sufficient information to determine whether the requirements of Section 5.5 of the Land-use by-law ... (see attached copy)"

After receiving this letter, Dr. Mehta says he retained Mr. Lederman as his lawyer. Nothing happened so Dr. Mehta wrote an (undated) letter to the Mayor and Town Council (tab 4) who considered the letter on or about October 7, 1985. Dr. Mehta says that he was promised a letter in reply from the Town solicitor which he has not yet received. He was told at that Council meeting that he could make a separate application for a building permit. On the next day Dr. Mehta made one application for a building permit to install siding and another application for pouring concrete on the front yard of the subject property. On October 8, 1985, Mr. Nelson replied in writing to these applications:

"Re: 248 Willow Street, building permit application for concrete front yard

> There is sufficient doubt in my mind of your property boundaries and structure locations as they exist, therefore I am requesting and [sic] up-to-date plan of survey prepared by a registered land surveyor which shall contain information regarding the site and location of all buildings (subsection 7.4 of the Building By-law, Town of Truro attached).
>
> Your permit application will be placed on hold until the above information is supplied..."

Dr. Mehta (tab 7) produced a conditional survey certificate dated July 18, 1985. On October 15, 1985, Mr. Nelson wrote Dr. Mehta (tab 8):

> "....the plan you provided is not a survey plan... nor should it be used as one ... I therefore cannot accept this plan .... requested .... October 8 ...."

Mr. Lederman then withdrew as Dr. Mehta's solicitor. Dr. Mehta then engaged Douglas Caldwell as his solicitor. In December, Mr. Nelson conceded that no building permit was required to allow the concrete paving of the parking lot in front of the building at 248 Willow Street.

On December 2, 1985, Mr. Caldwell wrote Mr. Nelson (tab 18):

> "... 248 Willow Street
>
> This letter is an application for a development permit and an occupancy permit ... for the use of the bottom floor ... for his medical office and for his wife's computer business as indicated in his previous application which was refused by letter of September 20... the parking requirement for the ground floor use ... amounts to 3.482 spaces ... the Zoning By-law stipulates that the parking lot standards are only triggered where ... parking ... for more than four vehicles are required ... the above application is clearly within the zoning requirements of the Town.

> ... since previous application has been made ... the Town should have on file all the information necessary to review these applications ... Each of these applications is a separate application"...

On December 11, 1985 Mr. Nelson replied to Mr. Caldwell's letter by a letter (tab 21) in which he said:

> "... your letter cannot be regarded as an application for a development permit. The Town has provided for certain forms ... if Dr. Mehta, or some person in his behalf, were to complete such an application then I will obviously consider same and issue whatever permit he will be legally entitled to ... when a proper application is completed and assuming there are no further difficulties ... the uses mentioned ... appear ... permitted...
> [for the pouring of concrete parking lot] an application is not necessary ...
> I do not... accept the plot plan [with its present disclaimers]
>
> Dr. Mehta's building application ... will be issued..."

The building permit sought was issued on December 12, 1985. Dr. Mehta felt the permit was issued too late to allow the installation of the siding before the onset of winter.

On January 8, 1986, Mr. Gruchy wrote to Mr. Caldwell (tab 27):

> "....In the event that Dr. Mehta does not make the appropriate application, then Dr. Mehta is in contravention of the Land-use By-law... we will have no choice but to take action."

On or about January 20, 1986, Mr. Caldwell replied to Mr. Gruchy that he had no further instructions from Dr. Mehta.

On March 19, 1986, Mr. Nelson wrote to Dr. Mehta (tab 30) and said as is here set out in full internal text:

"Dear Sir:

Please be advised that to date there are no approved permits for the use and occupancy of 248 Willow Street. Such use and occupancy without permits is a violation of Subsection 3.3A of the Land-use By-law of the Town of Truro.

An application having been made September 9, 1985 for the use of the above property has been active since that date, I refer you to correspondence on September 20, October 15, and November 19, 1985. Although there has been some contact in the latter part of 1985 the information originally requested has not been forthcoming. I therefore am refusing this permit for the following reasons:

1. that the drawings supplied showing the ground floor uses indicates more area is to be used than the lot will allow, given the parking requirements as indicated in your correspondence of September 20, 1985; and

2. that you have not clarified what use, if any, will be made of the second floor apart from what was indicated again in our letter of September 20, 1985;

This lack of information on your part has prevented this office from making any reasonable decision on the compliance of your proposed uses. To this end and given the time which elapsed since your original application and our last correspondence please find a copy of your refused permit.

As of November 29, 1985 we have been aware that you are using this structure as indicated in a [sic] report to Council regarding a site visit on November 29, 1985 at approximately 2:10 p.m. With this in mind I am referring this file to the Town Solicitor's Office to take appropriate action in this matter.

The above decision to refuse this permit is appealable under Section 78 of the Planning Act, Statutes of Nova Scotia, 1983..."

Dr. Mehta stated that he has done no work on the second floor of 248 Willow Street. Further he had the impression that the granting of his rezoning change was adequate authority for his actions in originally occupying 248 Willow Street and commencing its renovations. Dr. Mehta did not mention his intended use as a rooming house until he applied for a development permit.

Dr. Mehta stated the previous use of the building was "semi-commercial" partly residential, partly rooming house. 248 Willow Street had been used as a nursing home. At the same time it served as the family residence of the nursing home operator.

Dr. Mehta said it was Mr. Nelson's suggestion that he should make a limited application for ground floor uses only and beg the question, at least for the time being, as to the development of the second floor.

Dr. Mehta took his problem concerning 248 Willow Street to the office of the Ombudsman thereby trying to save legal fees and to speed up results.

Dr. Mehta said he made no fresh application for a development permit after the Caldwell letter and certainly not after December 11, 1985. Dr. Mehta took the position in December 1985 and maintains it today that there was no prescribed form of application for a development permit for the Town. He maintains he has made all the applications and provided all the information required under any law and is therefore entitled to his development permit. In the eyes of Dr. Mehta, Mr. Nelson, when giving the doctor advice on his application, has been guilty of a great deal of "flip flop" with advice.

By the date of the hearing, according to Dr. Mehta, Mr. Nelson was not going to allow the proposed use of the second floor and only 2/3 of the proposed commercial use of the first floor. Thus, Dr. Mehta would have to abandon the proposed use of nearly 70% of his building at 248 Willow Street.

Dr. Mehta never supplied Mr. Nelson with a revised survey certificate. Dr. Mehta says there was no need to provide a survey certificate at all since a survey certificate only related to the pouring of the concrete for the parking lot which did not require a permit.

Dr. Mehta says that he then told these facts to Mr. Nelson and that Mr. Nelson should process the outstanding application.

Since that request had failed, Dr. Mehta said he wanted "the Board to order the development officer of the Town of Truro to issue a development permit for the use of 248 Willow Street as Commercial use as applied for."

Dr. Mehta said he has enough parking for his purposes. Physically he could make 11 parking spaces on his land. According to Dr. Mehta, with residential zones on both sides of his land he could legally build maybe one parking lot on his land on the front of his building and none on the back of the building at 248 Willow Street.

Mrs. Jean Wilson, 38 Chipman Court, Truro, testified next. Mrs. Wilson is a non-council member to the Town's PAC. The PAC, whilst she was a member, recommended to Council the rezoning of 248 Willow Street. At first she had no independent recollection of the application concerning 248 Willow Street. She outlined the general proceedure used by the PAC in considering rezoning applications and she assumed that they had been followed in relation to the rezoning of 248 Willow Street. According to Mrs. Wilson, parking or the lack thereof would not enter into the PAC's decision on the rezoning application. The Committee would ordinarily inquire into many other matters including whether any buffer strip was required.

She knew of a Green Gables store and Steve's Honda dealership as being in two C-2 zones in close proximity to 248 Willow Street. Mrs. Wilson then seemed to remember that the issue of parking was raised at the PAC meeting.

Ina Mehta, wife of the Appellant, then testified. She said she was the owner of Ideal Computer Systems, a tenant at 248 Willow Street occupying a portion of the first floor of that building with a commercial use. It had been occupying that space since September 1985. Mrs. Mehta, in addition to the conduct of her own business, assists in the Doctor's office by doing the paperwork required by his office.

Several years ago, Dr. Mehta had built several apartment units within the Town and dealt with the then current planning requirements.

Mrs. Mehta says that they would never had bought 248 Willow Street if Mr. Nelson, on the numerous occasions that he had been asked for advice and guidance, had mentioned the problems of parking spaces required by the proposed development. As to the actual parking requirements of the present use of the buildings, there is no overcrowding since there is never more than one or two cars on the premises at any one time. Mrs. Mehta produced numerous photographs of various parking lots in the Town where the parking space of apparently commercial uses abutted land occupied by residential uses with no intervening buffer between the commercial parking area and the residential buildings. She contended that the hospital parking lot directly across the street from 248 Willow Street had been reconstructed "just this last year" right up against residences.

Mrs. Mehta attended Mr. Nelson's office once. She learned of the progress of the Mehta applications from the letters received, from this one visit at Mr. Nelson's, and from conversations with Dr. Mehta.

Douglas Taylor testified next. He lives at 89 Sawler Avenue. He is the former owner of 248 Willow Street. He lived there for over 30 years and "built most of it." Mr. Taylor used it for his personal residence and, at the same time, as a rest home commencing in 1964. The zoning for all that time was residential. 250 Willow Street was used as a restaurant for a while but not recently. A Mr. Hing Ju resides at 250 Willow Street in retirement. 246 Willow Street was always in residential use while Mr. Taylor was in residence at 248 Willow Street.

While using 248 Willow Street as a rest home, Mr. Taylor had as many as 12 residents at one time and at the last of such usage he had only 3 residents. In addition to housing these residents, himself and his wife, he also brought up a family of 8 at 248 Willow Street. 248 Willow Street has a fire alarm system.

Mr. Taylor vacated 248 Willow Street in December 1984 six days before Christmas and he sold the property to Dr. Mehta at the end of June 1985.

Dr. Mehta called Peter Nelson, town planner, development officer, and building inspector of the Town as his next witness. He has been employed by the Town for over six years in its planning department. He participated in the preparation of the Town's MPS.

Mr. Nelson confirmed that he had recommended the rezoning obtained at 248 Willow Street by Dr. Mehta.

Mr. Nelson said he saw construction work in progress at 248 Willow Street, checked the files in his office to see if the appropriate permits to do this work had been granted and seeing they had not been, he issued and delivered the stop-work order mentioned supra. He wanted Dr. Mehta to meet normal requirements by applying for a development permit and a building permit.

On accepting the subsequent application certain freehand drawings were submitted by Dr. Mehta and Mr. Nelson superimposed on those drawings the buffer zones for parking required to satisfy the buffering requirements of the Town's Land-use By-law as imposed because of the residential zoning of 250 Willow Street and 246 Willow Street. These drawings showed 16 parking spaces. All are located within the buffer area mentioned. If either of these neighbouring properties were rezoned to a commercial use similar to 248 Willow Street then it would relieve the buffering requirement to some extent on 248 Willow Street.

Mr. Nelson, on receiving an application that is reasonably complete, puts it in a file for action within 15 days within which the permit is either issued, refused, or there is reason given "if it is impossible to make a decision". No reasons are given if the permit sought is approved.

Mr. Nelson stated that an application for a development permit must be prepared and presented in the form prescribed in the Land Use By-law in order to receive a development permit. He referred to s. 3.3 of the Land Use By-law ss.(d) which referred to Schedule B of the By-law. According to Mr. Nelson, Schedule B is the form for application.

At this stage of his evidence, Mr. Nelson said that the Caldwell letter of December 2, 1985 is no application for anything. He said the Caldwell letter did not contain all the information necessary to comply with the requirements for a development permit application.

Mr. Nelson said he felt all applicants to his department were treated equally. He admitted that there were many locations in Town where there appeared to be insufficient buffering between the parking lots located on the lands apparently commercially zoned and the adjacent lands apparently residentially zoned. He explained that these apparent examples of insufficient buffering could actually be the result of illegal [but as yet undetected by Mr. Nelson] uses, that they could result from non-conforming uses, that the apparent conflict could be the result of minor variances legally granted, or that the apparent illegal uses could in fact be totally legal conforming uses. Without a study of the file on any given property he would be unlikely to know what the situation would be as regards to possible illegal parking on any given property. Mr. Nelson contended that the Town's Land Use By-law had no retroactive effect.

Today the maximum use previously put to 248 Willow Street [12 rest home persons and a family use] would have required the availability of 7 parking spaces according to Mr. Nelson.

Mr. Nelson said he had never sent the appropriate application forms requested by Mr. Caldwell since he required the attendance of the applicant at the development office so that the appropriate information could be garnered on the forms to place on the office computerized system. He said the policy of not sending out blank application forms on request is only a justified reluctance to dispense blank application forms and not a refusal to deliver same.

Mr. Nelson read from the MPS. In that document it appeared that the Town had three commercial zones:

1. A downtown Commercial Zone, called a C-1 Zone in the Land Use By-law.
2. A highway Commercial Zone called a C-2 Zone in the Land Use By-law.
3. A local commercial zone called a C-3 Zone in the Land Use By-law.
4. A chopping center-mall zone, called a C-4 Zone in the Land Use By-law.

In the residential section of the MPS, Mr. Nelson said there were no policy statements regarding parking-buffer abutting zone restrictions. C-1 Zone, C-2 Zone and C-4 Zone have no direct inter-zonal parking buffering requirements. C-3 Zone, on the other hand, does have a buffering parking to adjacent zone requirement. C-4 Zone would likely have such parking buffering brought in under the development agreement sections of the MPS. The industrial zone portion of the MPS requires interzonal buffering restricting parking. Recreational zoning has no such restriction in the MPS. Institutional uses require a buffering between themselves and adjacent residential uses. Mr. Nelson cited Policy #313 of the MPS and Policy #319 also as giving the authority for the inter-zonal parking buffering requirements in the Land Use By-law.

Mr. Nelson stated there has been a prosecution with respect to the Land Use By-law leading to a conviction of Dr. Mehta concerning some of his activities related to 248 Willow Street.

Mr. Nelson felt there had been a sufficient lapse of time of the rest home use at 248 Willow Street to destroy any possible continuance of any existing non-conforming use which might have been valid when the land was occupied by Mr. Taylor, the owner preceding the present Appellant.

At any time a development permit is sought, Mr. Nelson requires a completed application which contains information reflecting the scale of the property and the use proposed. He says he has no such information before him respecting 248 Willow Street. He further stated that the information has never been before him in a form he found acceptable.

According to the Minutes of Council of August 5, 1985, parking requirements related to 248 Willow Street would not be evaluated until a permit was applied for. At the PAC level as well, according to Mr. Nelson, the matter of the Parking requirements of 248 Willow Street had likewise been dealt with. Mr. Nelson said that Dr. Mehta was present at the August 5th Council meeting. The matter of a proposed rooming house use at 248 Willow Street was not alluded to during either the committee or the Council meetings leading to the rezoning of 248 Willow Street.

Mr. Nelson said he first became aware of the rooming house portion of Dr. Mehta's proposal concerning 248 Willow Street when the application listing it came to his department in September 1985.

According to Mr. Nelson, sufficient information was placed in the initial application so that an evaluation of the parking requirements of Dr. Mehta's proposal could be made. The evaluation showed that the application should be rejected as not meeting the Land Use By-law requirements for parking.

According to Mr. Nelson, on-street and off-street parking on Willow Street are major concerns in any development proposals located on the street. Willow Street is one of the main arterial streets leading in and out of Town. It carries all the extra traffic generated by the hospital located opposite 248 Willow Street. Improvements to traffic, especially to the mixing of pedestrian and vehicular traffic, are currently being pursued by Council.

Detailed surveys have become necessary for developments along Willow Street and were requested from Dr. Mehta and from other developers along Willow Street as well.

A minor variance, according to Mr. Nelson, is possible allowing him to give a development permit for 248 Willow Street along the lines of its present use. A minor variance would require a much stricter definition (than is presently available on file) of the permitted use. Much more information must be made available by the applicant to the development officer on an appropriate application form before the development officer could grant any such minor variance.

Mr. Nelson is not aware of any illegal use being perpetrated by a Mr. Hing Ju at 250 Willow Street.

Section 5 of the Land Use By-law defines the size of an ordinary parking space.

Mr. Nelson says there is no prohibition on Dr. Mehta making a fresh application for a development permit and any necessary minor variance at this time or at any other time. Mr. Nelson says he has not received enough information to even consider a minor variance to accommodate Dr. Mehta's requirements at 248 Willow Street.

Mr. Nelson says that at the end of any successful rezoning motion in Council the Mayor always cautions the successful applicant about the 21 day rezoning appeal period and he did so in the case of Dr. Mehta's successful rezoning of 248 Willow Street.

There was a building permit application to pour a concrete parking lot which eventually turned out to be unnecessary although asked for by the Town planning staff.

Mr. Nelson did not regard the Caldwell letter as an application for a permit of any kind. He said it was not on the approved form. The letter did not contain the information required under Section 3.4 of the Land-use By-law. He said he regarded the letter as a hopeful sign that the unauthorized development being carried out at 248 Willow Street would become authorized by positive action from the Appellant. He said his letter of March 19, 1986 is an explanatory letter rather than a refusal of a development permit.

Mr. Nelson denied that he had informed Dr. Mehta that he would not be able to use for commercial purposes the basement, the second floor, and about 1/3 of the first floor of

248 Willow Street yet that allegation was set out in a letter to the Town from the Ombudsman inquiring on behalf of Dr. Mehta's problem.

Mr. Nelson said he still held the position expressed in his letter of December 11th, 1985 that if Dr. Mehta completed an appropriate application then the development officer would consider the same and issue the doctor whatever permit he would be legally entitled to. No such application as requested has as yet been received. When such an application is received, Mr. Nelson says he will deal with it.

Mr. Nelson has viewed 248 Willow Street, as it is being used, and says those uses would be permissable uses provided the correct development permit were obtained.

Mr. Nelson says the reference to "buffering strips" used throughout this appeal is not a correct reference and the accurate term, in planning parlance, would be "yard requirement". The requirement of S.9.1 of the Land-use By-law is a yard requirement, an abutting zone requirement.

Dr. Mehta, in the view of Mr. Nelson, was treated no differently than any other applicant, neither better nor worse.

Michael C. Shipley, deputy building inspector of the Town, said he was "just a planning technician" at the time of his personal involvement with Dr. Mehta's applications made in respect to 248 Willow Street. Mr. Shipley said he had "taken" the original application made by Dr. Mehta in the development office on the same day the doctor had received his stop-work order. During the taking of the information for the application when parking was mentioned, Dr. Mehta expressed some concern. Mr. Shipley interrupted Mr. Nelson (who was having a conversation with someone else) to ask whether parking was required. Mr. Nelson said parking was required and therefore Dr. Mehta was required to have a parking plan. According to Mr. Shipley, Dr. Mehta "became quite upset at that time couldn't understand why you needed parking". Mr. Shipley at that time also asked for building plans which Dr. Mehta did not then have. Plans were brought back at a later date. The application was for both a building permit and a development permit.

Mr. Shipley said he introduced the subject of parking when the doctor started talking about putting boarding rooms upstairs.

At the present, Mr. Shipley has nothing to do with parking requirements, only with building permits. Any renovation over $1,000.00 or over 100 square feet requires a building permit in the Town. Building permits for minor alterations are usually issued within a day. Driveway construction does not require a building permit.

Mr. Shipley said he attended 248 Willow Street on two occasions subsequent to the taking of the initial application. On each occasion he was accompanied by Mr. Nelson. On the first occasion, he heard Mrs. Mehta say that she was carrying on her computer business at that location and that, in respect to Dr. Mehta carrying on his medical practice at that location, they had better let the doctor answer for himself. On the second visit, a couple of hours later, they met Dr. Mehta on the premises and Mr. Nelson asked him if he was carrying on his medical practice at the site and he answered that he would not answer anything in the absence of his legal counsel.

Mr. Shipley has never investigated anything concerning 250 Willow Street.

In November of 1985, the development office initiated the use of a computer to take applications for building permits and to store the information required on development permit applications. The computer service was then "officially set up"; the use of the computer before that time was experimental, but after that time was in use on both types of applications.

The defects that Mr. Shipley recognized with Dr. Mehta's September application were, as to development permit application, the inadequate parking and, as to the building permit application, "no building plans, what walls you were going to move, didn't know what construction you were going to do". He said Dr. Mehta became so upset concerning the questions and answers required in filling out the application that the doctor signed the form when there were still blanks unfilled and walked out saying he would return with the information.

Mr. Shipley stated that he did not have that much knowledge of building permits at the time he took the written application from Dr. Mehta. At the time of the taking of the application, Mr. Shipley testified "I was totally ignorant of the By-law. I didn't know anything about it at that time."

Mr. Shipley also took a building permit application made on behalf of Dr. Mehta by one Peter Rogers, an articled clerk of Mr. Caldwell. This application was for siding and new doors at 248 Willow Street and had a stated cost of $4,000.00.

Ms. Sukesha Mehta, teen-age daughter of Dr. and Mrs. Mehta, was the Appellant's next witness. She said that a factory for producing bean sprouts for the Chinese Food trade was carried on in the house of Mr. Hing Ju located at 250 Willow Street.

Jaunita Atkinson, a secretary employed in the development office was Dr. Mehta's last new witness. She believes that the practice of her office in taking information using the computer is a much more efficient way of gathering the facts and information together for Council report purpose, Statistics Canada purposes, and for direct in-office purposes.

The application tab-2 is undated and the date is cut off on the computer printout also found under that tab. On the exhibits before the Board, Mrs. Atkinson cannot tell whether or not the undated application and the computer application she was shown were one and the same application. After an adjournment to obtain a new computer printout from her office, Mrs. Atkinson produced the "new printout" which was marked Exhibit M-15 and which in fact consisted of a photocopy of Dr. Mehta's signed September application and separate sheet of paper containing a printout of that application as it was stored in the computer. The first part of this "printout" was dated September 18, 1985 and the actual printout portion was dated November 1, 1985.

Mrs. Mehta came back on the stand and testified to certain distances around the Chronicle-Herald building.

Dr. Mehta returned to the stand to testify concerning the receipt of a letter from Mr. Caldwell. The letter had been previously tendered by Dr. Mehta and objected to by Mr. Gruchy. Now Mr. Gruchy suggested that the letter in question be accepted into evidence.

Dr. Mehta entered into possession of 248 Willow Street on July 26, 1985" in accordance with his deed".

After the conclusion of the evidence, the Board adjourned and reserved its decision pending the receipt of written argument to be presented by each side. The last post-hearing memorandum was received by the Board on October 10, 1986.

From the evidence set out in such great detail supra it appears to the Board Mr. Nelson vacillated in his positions and advice to the Appellant during the time period leading up to the hearing of this appeal. The Board is unable to determine how much of the apparent inability of Dr. Mehta to take instruction from Mr. Nelson derives from Mr. Nelson's vacillation. However, Dr. Mehta was more sophisticated in development matters in Truro than his conduct leading up to this appeal and his evidence and argument before the Board would lead one to believe. The Board is satisfied from the evidence and the demeanour of both men on the stand that notwithstanding Mr. Nelson's vacillation, Dr. Mehta is to some extent the author of his own misfortune.

For the reasons set out in detail above and conceded in argument by the Town's solicitor, the Board agrees with Dr. Mehta's position that the planning law applicable to the Town does not prescribe any particular form of application form for a development permit.

The wording of the relevant portions of the Land Use By-law not previously cited in this decision are as follows:

> "3.3(b) The development permit shall be in the form as is set out in Schedule "B" of this By-law.
>
> 3.4(a) Every application for a Development Permit shall be in duplicate and shall be accompanied by such plans and copies drawn to an appropriate scale and showing such of the following as the Development Officer may require:

(i) the true shape and dimensions of the lot to be used, and upon which it is proposed to erect any building or structure,

(ii) the proposed location, height, and dimensions of the building, structure, or work in respect of which the permit is applied for,

(iii) the proposed location and dimensions of parking spaces, loading spaces, driveways,

(iv) natural land features such as wetlands, water compounds, water courses, slope by topography, and

(v) such other information as may be necessary to determine whether or not such development reconstruction or redevelopment conforms with the requirements of this By-law.

(b) The application shall be signed by the owner of the lot or by the owner's duly authorized agent and shall set forth in detail the present and proposed use of the lot and each structure, or part of each building or structure, together with all information necessary to determine whether or not every such proposed use of land, building or structure conforms with the requirements of this By-law.

(c) Where the Development Officer is unable to determine whether the proposed development conforms to this By-law and other by-laws and regulations in force which affect the proposed development he may require that the plans submitted under Subsection 3.4(a) be based upon an actual survey by a Nova Scotia Land Surveyor."

This By-law derives its legislative support from the Town's MPS passed and approved under the provisions of S.40, 41, 42 and 43 of the Planning Act and the Land Use By-law provisions of the same statute found in s.51, 52, 53, and 54.

The MPS deals with parking provisions:

"P-313 - Require that all land uses in the town provide parking according to their use, such parking to be provided when:

- a new use comes into being,
- an existing use changes, or
- an existing use is expanded.

P-314- Require that the parking requirements be provided within the same zone in which the use is permitted.

...

P-318- Remove (or reduce) on-street parking on heavily used streets to facilitate improved traffic movement.

P-319- Actively enforce the parking requirements throughout the Town and ensure that these and other parking regulations and laws are co-ordinated to be effective in their intent."

The Land Use By-law has these additional parts which are relevant to this appeal:

"Section 1 DEFINITIONS ...

"Parking Space" - means an area of at least 16.5 sq.m. and at least 2.75 metres wide for the purpose of parking a motor vehicle exclusive of driveways and/or aisles.

....

"Professional Buildings" - means a building or part thereof in which the principal or main use is the provision of professional services to the public.

.....

"Site Coverage: - means lot coverage

...

"Yard" - means the part of a lot unoccupied by the main building.

(a) "Front Yard": means a yard that extends across the full width of a lot between the front lot line and the nearest main wall of any building on such lot.

(b) "Rear Yard": means a yard that extends across the full width of a lot between the rear lot line and the nearest main wall of the main building on such lot.

(c) "Side Yard": means a yard that extends from front yard to a rear yard between the side line of a lot and the nearest main wall of the main building thereon. Where more than one building is erected or altered on one lot the side line of the lot shall be interpreted as the centre line between two buildings.

....

(e) "Minimum Yard": means the smallest yard permitted by this By-law.

....

"2.3 Zoning Boundaries ...

(b) Where a zone boundary is indicated as approximately following the lot lines, such lot lines shall be the boundary.

....

"3.3 Development Permits

(a) No development shall be undertaken unless a development permit has been granted by the Development Officer.

....

GENERAL PROVISIONS FOR ALL ZONES

4.1 Scope

(a) no development shall hereafter be permitted or the use of any building changed unless a development permit has been issued and no development permit shall be issued except in compliance with this By-law

....

4.15 Multiple Use

Where any land or building is used for more than one purpose, the provisions of this By-law relating to each such use shall be complied with.

5.1 Parking Requirements

For every building ... for which application for a development permit involving a change of use is made, off-street parking located within the same zone as the use shall be provided ... in accordance with the following requirements:

USE		REQUIREMENTS
(a)	Residential	
	....	
(ii)	All other dwellings	1.5 parking spaces for each dwelling unit
(b)	Commercial	
	....	
(ii)	Offices	One parking space per 28 sq.m. of floor area within the same zone
	....	
(vii)	All other commercial uses	One parking space for each 18.5 sq.m. of retail space

COMMERCIAL, GENERAL PROVISIONS

9.1 Abutting Zone Requirements

Where a Commercial Zone abuts a Residential ... Zone, the following restrictions shall apply to a yard within the Commercial Zone ....

(a) The minimum side yard requirement for the abutting side yard shall be 6.1 M.

....

(c) No parking space shall be permitted in an abutting yard within 6.1 M of a side or rear lot line in the Commercial Zone.

....

10.1 COMMERCIAL ZONES-PERMITTED USES

No Development Permit shall be issued in a commercial zone except for uses as they are assigned below:

....

USES	C-2
Business and Professional Offices	x
Commercial Schools	x

Medical Clinics	x
....	
Residential (above ground floor)	O [N.B.]
....	
Institutional uses	x
....	
Specialized Retail Uses:	
....	
Office and institutional equipment	x
....	
Warehousing/Wholesale	x "

Whatever complaints Dr. Mehta may have against his treatment in this matter by Mr. Nelson, they do not bear upon the duty of the Board in this matter which is spelled out in S.78 of the Planning Act the applicable portions of which are as follows:

> "S.78 (1) The refusal by a municipal development officer to issue a municipal development permit may be appealed by the applicant therefor.
>
> ...
>
> (3) The Board shall
>
> (a) confirm the decision of the municipal development officer; or
>
> (b) allow the appeal by ordering that the permit be granted, but no permit shall be granted that is inconsistent with the land-use by-law ...."

The Board then must first decide if the permit, when granted, would be inconsistent with, or consistent with, the Land Use By-law. If it is consistent with the Land Use By-law then the Board has no alternative but to confirm the decision of the development officer and to dismiss the appeal.

To see what the permit would allow, if granted, the Board must look at the application tendered to the development officer, assume what is sought will be granted, and then test this against the Land Use By-law to see:

1. If there is sufficient information to enable the project to be defined and so tested, and, if there is,
2. Is the project so detailed consistent with the Land Use By-law?

The application lacks the sufficiency of information required by the Land Use By-law itself in, at least the following particulars:

(a) it does not have accompanying plans drawn to an appropriate scale, or at least no evidence of the same was adduced before the Board.

(b) the applicant has never attended as often as necessary on the development officer to allow that officer to fully determine from explanations of the proposal which, if any, of the optional informational requirements contained in S. 3.4 of the Land Use By-law he would need answered before he could fully consider the development agreement application. A great many options are open to the development officer in requesting information before he has to agree to granting a development permit. One project may be so complex that he requires much detail on each optional request. Another may be so simple that he requires none of the optional information he might otherwise request. The development officer requires the information necessary to make his preliminary findings as to which of the optional information requirements he will want. He can most easily get this preliminary information in his office directly from the applicant. It seems to the Board that the only way a sensible applicant could avoid such co-operative conduct with the development officer would be to make himself thoroughly familiar with the Land Use By-law, make an application for a development permit so exhaustive on all points that the development officer could require and hope that the information provided would answer - in advance - all relevant questions concerning the proposal. The environment of the Planning Act, the MPS, and the Land-use By-law should encourage developers and development officers to work together. When those two parties determine that they, for whatever reason, wish to work in a confrontational manner then the desired result is not so easily achieved.

The project proposed in the application [and therefore the project to be approved in the projected permit] is inconsistent with the Land Use By-law itself in, at least, the following particulars:

(a) it would permit parking in yards where parking is prohibited under the Land Use By-law.

(b) if the parking spaces are deleted from the project then the project would not have the on site parking spaces required by the Land Use By-law for the proposed uses.

The Board cannot deal with the minor variance suggested by Mr. Nelson to legalize Dr. Mehta's present occupations of part of the space in 248 Willow Street. The Board commends the idea of a minor variance as a possible better alternative to the present illegal usage of the premises.

Dr. Mehta's evidence, when read as a whole, and given a most favourable interpretation from his point of view raises issues that are not within the power of the Board to deal with.

The permit sought, if granted, would be inconsistent with the Land Use By-law of the Town. The Board therefore, pursuant to S.78(3)(a) of the Planning Act confirms the decision of the municipal development officer of the Town made March 19, 1986 refusing the Appellant a municipal development permit for 248 Willow Street.

An Order to dismiss this appeal pursuant to Section 29 of the Municipal Board Act will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of November, A.D., 1986.

RICHARD L. WELDON
Member

Oakdene Estates Ltd. v. County of Halifax

PLANNING--ZONING AMENDMENT--"REFUSAL" TO REZONE FROM R-1 TO R-2 TO PERMIT TWO UNIT DWELLINGS IN 14-LOT SUBDIVISION--WHETHER AN APPEALABLE DECISION OF COUNCIL--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, SS. 43(1), 51(1), 59(4), 66(1), 63(1),(2),(3),(4),(5)--COUNTY OF HALIFAX MPS POLICIES P-29, P-31

This is an appeal from a decision of the Council of the Municipality of the County of Halifax refusing to amend the Municipality's Land-Use By-law by rezoning 4.7 acres of land in Lower Sackville from R-1, a single unit dwelling zone, to R-2, a two unit dwelling zone. The lands have tentative approval for subdivision into 14 lots. By a majority vote of members present in quorum Council voted in favour of the rezoning. Both the planning staff and the Planning Advisory Committee (PAC) recommended in favour of the amendment.

HELD: The appeal is allowed. The Board orders Council to rezone the area of the 13 lot rezoning "favoured" by Council from R-1 to R-2.

Under s. 63(3) of the Planning Act the Board has to determine whether the decision of Council to refuse to amend the Land-Use By-law carries out the intent of the MPS. Under s. 63(5) the Board shall not allow the appeal unless the decision cannot reasonably be said to carry out the intent of the MPS. A preliminary question is whether the actions of the members of Council amounted to a decision of Council. Here the positive vote of the majority of the quorum was less than "a majority of the whole Council" and cannot be taken as either an "amendment or revision" of the Land-Use By-law. The motion as it was passed by Council has for all practical purposes at least the effect of not allowing the amendment. The action taken by Council defeats the Applicant's proposal as would a genuine refusal. If this is not regarded as a refusal the rights of appeal provided for in the Planning Act would be removed. The Board finds that the motion to amend passed by an insufficient majority followed by the passing of a motion to adjourn amounts to a refusal decision. Thus the Board has jurisdiction. On the merits, this application follows from the Board's previous decision in Oakdene [1] involving the same developer and lands but less intense land use. The planning staff, the PAC, the local Councillor and the majority of Council present at the vote all favoured the present proposal. The concerns of affected citizens were addressed and fully taken into account in the formulation of the municipal planner's opinions. Previously it appeared that 70 units on this land would comply with the intent of the MPS. The Board now finds that the 27 dwelling units (1 single- and 13 two- unit dwellings) falls well within the intent of the MPS. The Board agrees with the reasoning found in Oakdene [1]. The refusal decision does not reasonably carry out the intent of the MPS.

NSMB-526-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by OAKDENE ESTATES LIMITED, a body corporate, from the decision of the Council of the MUNICIPALITY OF THE COUNTY OF HALIFAX made on May 5th, 1986 refusing to amend the Municipality's Land Use By-law by changing, from R-1 to R-2, the zoning of certain lands being Lot YA-8AR-2AXC of lands of O.E.L. Investments Limited and of Oakdene Estates Limited off Florence Street, Lower Sackville, in the Municipality of the County of Halifax

BEFORE: RICHARD L. WELDON, Member

COUNSEL: THOMAS M. MACDONALD, L.L.B., for the Appellant, Oakdene Estates Limited;

ROBERT CRAGG, Q.C., for the Respondent Municipality.

DECISION

Pursuant to Section 16(1) of CHAPTER 9, S.N.S. 1981, THE MUNICIPAL BOARD ACT, THE CHAIRMAN assigned Board Member Richard L. Weldon to hear this planning appeal at the Board's October 27, 1986 sittings at the Board Room of the Expropriations Compensation Board, 1660 Hollis Street, Halifax, N.S., commencing at 10:00 A.M. The Notice of Appeal dated May 23, 1986 was received by the Board on May 23, 1986 and states that the Appellant appeals the May 5th, 1986 decision of the Council (hereinafter called the Council) of the Municipality of the County of Halifax (hereinafter called the Municipality) refusing the Appellant's application to amend the Respondent's Land Use By-law by changing, from R-1 to R-2, the zoning of certain lands being Lot YA-8AR-2AXC of lands of O.E.L. Investments Limited and of Oakdene Estates Limited off Florence Street, Lower Sackville, in the Municipality of the County of Halifax, Province of Nova Scotia.

The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman took no objection to the Notice. The Notice of Appeal was filed accompanied by a written undertaking to pay the costs of advertising the Notice of Hearing.

In the Sackville area of the Municipality, R-1 is a single unit dwelling zone and R-2 is a two unit dwelling zone which zoning the Appellant seeks.

The lands in question, graphically set out in Exhibit 0-5 (and herein also referred to as the lands), are situate in the community of Lower Sackville off Florence Street, a public highway in that community. They are owned by the Appellant, in part,and, in part, by a corporation owned by a principal of the Appellant. The lands have tentative approval for subdivision into 14 lots comprising in the whole 4.7 acres. Access to the lands is gained by a proposed road, Florence Place, which ends on its south-eastern end in a cul-de-sac. Along the north-eastern boundary of the lands are

6 lots of a subdivision containing single family dwellings. On its most "southerly" side lie undeveloped lands. To the south-west side are commercial lands which, in turn, front on Sackville Drive. Three or four lots lie between the north-western boundary of the lands and the nearest boundary of Florence Street. The lands are presently wooded and they are zoned R-1.

At the commencement of the sittings at the Board Room at 10:00 A.M. on October 27, 1986, all parties present agreed all preliminary services, filings, and advertisements had been accomplished in their appropriate forms and times. On Affidavit proof of such service, the Board assumed jurisdiction to hear the appeal as far as proper service could ensure jurisdiction.

The Board notes that if no appealable decision of Council was made, then no appeal could be made to the Board. Solicitors for the Appellant and for the Municipality agreed that there was such an issue to be determined but agreed that it would be more convenient for all concerned if all the evidence on all issues was heard and then the Board could determine this matter of jurisdiction and, depending on that determination, decide upon any issues then properly remaining before it.

Counsel for the Appellant and counsel for the Municipality made opening remarks to the Board. Mr. Cragg, counsel for the Municipality, noted there was a Municipal Planning Strategy (MPS) for the district involved in this appeal.

On behalf of the Respondent Municipality, Mr. Cragg called no witnesses.

Counsel have clearly brought out the facts in this appeal and there seems to be no real dispute on the facts.

Under Section 63(3) of the Planning Act, S.N.S. 1983,c.9, the Board has to determine whether the decision of Council to refuse the Appellant's application to amend the Land Use By-law in the matter requested reasonably carries out the intent of the MPS. Under Section 63(5) of the Planning Act, the Board shall not allow the appeal unless the Decision of Council to refuse the Appellant's application to amend the Land Use By-law in the manner requested cannot reasonably be said to carry out the intent of the MPS.

Under Section 63(1) of the Planning Act, an applicant may appeal a Council's amendment of Land Use By-law, a Council's revision of a Land Use By-law, or a Council's refusal to revise or to amend a Land Use By-law. Under section 63(2) of the Planning Act, the refusal to amend the Land Use By-law is clearly accomplished by a "decision of council."

The only decision before the Board is a majority vote of those members of Council present in quorum of Council to allow the rezoning application (17 councillors present, 1 abstention, 9 in favour of the motion to approve the rezoning, 7 against the motion). That majority is an insufficient majority (A minimum majority in the Council of 11 out of 21 voting for is required for the application to rezone to become an amendment to the Land Use By-law.) to positively pass the motion to rezone. (See sections 43(1), 51(1), 59(4), 60(1) of the Planning Act). In the current appeal the Board notes that there has been no decision of Council expressly refusing to rezone the land. It appears clear to the Board because of sections 43(1), 51(1), 59(4), 60(1) of the Planning Act read together that the positive vote of the majority of the quorum of Council which in this case was less vote than "a majority of the whole Council" cannot be taken as either an "amendment or revision" of the Land Use By-law and thus the Board has no jurisdiction to hear this appeal under either of those two heads of appeal. The only remaining basis for the Board's jurisdiction under Section 63(1) supra would be if the decision of Council were a refusal by the Council to amend the Land Use By-law within the meaning of that section.

The first issue the Board must decide is whether the decision of Council in favour of the rezoning but with insufficient majority to satisfy the provisions of the Planning Act is, or is not, a refusal within the meaning of Section 63(1) supra. If it is not a refusal then the Board has no jurisdiction to hear this appeal on its merits. If it is a refusal then the Board has jurisdiction to hear this appeal on its merits.

For all practical purposes the motion as it was passed by Council has at the least the effect of not allowing the Applicant's amendment to the Land Use By-law. The action taken by Council defeats the Applicant's proposal as would a genuine refusal by a majority vote of the Council against approval of rezoning. The action taken by Council if one interpretation of the applicable law is taken, in addition removes any right to appeal which the Applicant might have to a refusal. By the same argument the right the Director has to appeal a refusal is likewise removed: the same reasoning deprives the Council of an adjacent municipality of its ordinary right to appeal a refusal. An aggrieved person would not likely want to appeal a refusal. Given the power of the Board under Section 63(4)(c) of the Planning Act to order amendments to the Land Use By-law other than those sought by the Applicant or found satisfactory to the majority of the whole Council the Board can conceive of a situation where an aggrieved person might well wish to appeal a refusal. He has that right on a refusal. He may not have that right in the present situation even though his interests here could be identical with his interests in a situation in which the decision of Council would unarguably be a refusal.

The Board is of the opinion that the Legislature could not have intended, in passing S.63(1) of the Planning Act, to make insufficient majority opinion of Council non-appeable while in that same section clearly making appealable both wholehearted acceptances of amendments and revisions and express and overwhelming rejections of the same.

The Board therefore finds that the motion of Council to amend the Land Use By-law passed herein with an insufficient majority followed by the passing of a motion to adjourn amounts to a refusal decision within the meaning of the Planning Act and thus the Board has jurisdiction to determine whether or not that refusal decision is reasonably within the intent of the MPS.

The Appellant called as its two witnesses, John Arthur Gillespie and James Michael Hanusiak. The Municipality called no witnesses. Appearing and giving evidence as interested citizens were Martha Craig, Donald Bowlin, Raymond Keefe and Clarence Ayers.

John Arthur Gillespie is the President of the Appellant, lives in Sackville, and is a land developer of considerable experience throughout various areas of the Province including Sackville. Under his direction the Appellant had previously proposed to develop the lands by rezoning them to R-4 and placing a 70 unit apartment house on the lands. Planning staff of the Municipality had recommended in favour of that proposal but the Council of the day had turned down that rezoning proposal. The Appellant appealed Council's refusal to the Nova Scotia Municipal Board which ratified the Council's refusal to rezone the lands to R-4.

Making due allowance for the reasons given in the Municipal Board's decision, the Appellant, according to Mr. Gillespie, made a fresh application to rezone the lands from R-1 to R-2 for some 14 lots. Planning staff again recommended that the proposed rezoning be granted as applied for. The Municipality's Planning Advisory Committee (PAC) recommended the same course of action to Council.

Council made the decision to "approve" rezoning of 13 lots only (the decision by the vote outlined above which is an insufficient majority to satisfy the provisions of the Planning Act for a majority vote of the whole Council).

Mr. Gillespie holds the view that the lands cannot in the present economic climate be successfully developed under the lands' current R-1 zoning. In his considerable experience as a developer, Mr. Gillespie believes he is quite familiar with the Municipality's MPS and Land Use By-law and he has the firm opinion that his proposal, as modified by the positive motion of Council, fully meets all criteria of those documents. He believes that current market trends and construction costs militate for a sound economic development of the lands under his proposal and thus he is willing to attempt to develop as proposed if he can attain his needed rezoning.

J. Michael Hanusiak, the Municipal Planner who advised the PAC and Council on the current proposal of the Appellant (now a planner in the employ of the City of Halifax), was qualified as an expert entitled to give opinion evidence before the Board on planning matters as they affect the Municipality in general and Sackville in particular.

Mr. Hanusiak reviewed in detail the documents tendered respecting the proposed rezoning and related the proposed rezoning against the MPS and the Land Use By-law and said that he had the firm opinion that proposed rezoning complied reasonably with the intent of the MPS. He also expressed the opinion that the motion as passed by Council was a motion to refuse the rezoning and that was the only sensible and possible reading of the Planning Act. He agreed that the 13 lot rezoning "approved" by Council also reasonably complied with the MPS.

Martha Craig and Clarence Ayers gave the Board detailed presentations against the proposed rezoning mentioning problems of traffic, schools, lack of buffering for the existing R-1 developments and other concerns related to growth in the Sackville area.

Donald Bowlin made a far reaching critique of the Municipal scene but his most direct concern over the subject proposal dealt with the problems of the extra traffic and the lack of appropriate sidewalks.

The Board has found that the motion of Council passed herein (with an insufficient majority to amount to an amendment to the Land Use By-law) followed by the passing of a motion to adjourn was a refusal within the meaning of the Planning Act and thus the Board had jurisdiction to test whether or not that refusal decision was reasonably within the intent of the MPS.

To the extent that the vote of Council itself is an aid in the determination of the intent of the MPS and its relationship with the decision of Council, the Board notes that a majority of a quorum of Council favoured the proposed rezoning.

The municipal planner gave an exhaustive review of the MPS and the proposed rezoning and expressed the opinion that the proposed rezoning complied in full with the intent of the MPS.

The President of the Appellant gave an opinion based on experience in the development field, and was not contradicted by any contrary expert opinion, that the proposed rezoning agreed with the intent of the MPS.

All concerns expressed by those citizens affected who took advantage of this latest opportunity to object to this rezoning were, in the opinion of the Board, addressed by the planner in his study of the proposal and fully taken into account in the formulation of his opinions.

In the previous Board decision concerning the development of these lands by this developer (see Oakdene Estates Limited and the Municipality of the County of Halifax, NSMB-459-84-P) [1] the Board suggested as an appropriate solution to the concerns of the citizens and the developer a development agreement process to control development of the lands. The developer has chosen not to follow that suggestion of the Board although that option was open to it at the time it commenced its application for the present proposal. Councillor MacKay as the local Councillor who moved and voted for the "favouring" motion suggested the proposed rezoning to R-2 better met the concerns of the protesting citizens than might a development agreement that could provide even more intense utilization of the lands.

The decision in Oakdene [1] fully sets out the technique to be used by the Board to determine the intent of the MPS. The lands and developer are essentially the same in the Oakdene [1] appeal and in this appeal. The two appeals are quite close in time. The Municipality's planner, the same person in each case, recommended both rezonings. Council, at least in effect, refused both rezonings. In each case the developer appealed. The main difference seems to be in the density allowed by the two rezonings proposed, R-4 in Oakdene [1] and R-2 in this current appeal.

Without setting out in full the sections of the current MPS, substantially the same as the MPS already cited in Oakdene [1], the Board will cite a few portions of the current MPS before the Board as Exhibit 0-8:

> "Page 30
> URBAN RESIDENTIAL DESIGNATION
>
> ....
> The Urban Residential Designation is designed to recognize the importance of the single unit environment ... and yet acknowledge the need for higher density residential ... development ...
>
> P-29 Within the Urban Residential Designation ... it shall be the intention of Council to support the existing single unit residential environment with its associated community facility uses and to provide for a variety of housing in future development .....
>
> [Page 31]
>
> P-31 Notwithstanding Policy P-30, within the Urban Residential Designation, Council may consider permitting low density residential developments which are of a scale and location not inconsistent with existing neighbourhoods. In this regard, two unit dwellings may be permitted by amendment to the zoning by-law. In considering such amendments Council shall have regard to the provisions of Policy P-104."

In Oakdene [1] at p.27, the Board has this to say concerning the 70 unit proposal then before the Board:

> "The board also has sympathy with the Appellant [the developer] whose development addresses many of the concerns in a responsible way.
> ...
>
> [p.23] ... lot could accommodate 132 units rather than the 70 proposed by the Appellant. If the maximum allowable 132 units were built on the subject lands ... [it] might not be satisfactory .....
>
> [p.26] ... if the subject lands were rezoned to allow multiple unit dwellings, this or any subsequent owner could build a maximum of 132 units rather than the proposed 70 ... This allowable increase would considerably alter the impact on abutting property owners and on area residents."

At the time of the decision of Oakdene [1] the Land Use By-law of the Municipality did not permit a development agreement process for the then proposed development. The Municipality's present Land Use By-law (Exhibit 0-9) does make provision for the use of a development agreement technique had the developer wished to bring forward his original previously appealed 70-unit proposal.

> "3.6 OTHER USES CONSIDERED BY DEVELOPMENT AGREEMENT
>
> ...
>
> (j) multiple unit dwellings on local residential streets within the Urban Residential Designation."

It chose not to repeat its previous application but made a permissable application to rezone under P-31 to accommodate two unit dwellings.

In Oakdene [1] the Board seemed to indicate that it considered 132 units as not within the intent of the MPS but that 70 units, could it have been limited to such numbers, would have been within the intent of the MPS.

The main difference between the decision appeal in Oakdene [1] and the decision appealed herein seems to be in the density allowed by the two rezonings proposed, R-4 in Oakdene [1] and R-2 in this current appeal. In the present appeal, an as-of-right development of the subject lands as now subdivided would allow for 14 dwelling units, the rezoning of the subject lands (as now subdivided) as applied for would allow for 28 dwelling units, and the rezoning motion concerning the rezoning of the subject lands (as now subdivided) voted upon by Council would have permitted 1 single family dwelling unit and 26 dwelling units made up of 13 two unit dwellings for a total of 27 dwelling units. Previously it appeared that 70 units on this land would comply with the intent of the MPS. The Board now finds that the 27 dwelling units that will be permitted by the present rezoning, "favoured" by a majority of the quorum of Council, falls well within the intent of the MPS.

The Board will not repeat the exhaustive reasoning which can be found in Oakdene [1], but it agrees with the reasoning therein contained.

Having reviewed the evidence and the applicable law it is the opinion of the Board the refusal decision of the Council does not reasonably carry out the intent of the MPS and the Board must interfere with that decision by allowing the appeal and ordering Council to amend its Land Use By-law by rezoning the area of the 13 lot rezoning "favoured" by Council in the decision appealed from its present R-1 Zone to an R-2 Zone.

Pursuant to Section 63(4)(c) of the Planning Act the Board allows the appeal. Pursuant to said Section 63(4)(c) the Board, in allowing the appeal, instructs the Council to amend its Land Use By-law by rezoning the area of the 13 lot rezoning "favoured" by Council in the decision appealed from its present R-1 Zone to an R-2 Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of December, A.D., 1986.

RICHARD L. WELDON
Member

Askri v. City of Halifax

PLANNING--CONTRACT ZONING--REFUSAL OF DEVELOPMENT AGREEMENT TO PERMIT CONVERSION OF EXISTING 4-UNIT BUILDING TO AN 8-UNIT BUILDING--WHETHER REASONABLY CONSISTENT WITH INTENT OF MPS --PLANNING ACT, S. 72(4)--CITY OF HALIFAX PENINSULA AREA LAND-USE BY-LAW, S. 56(1)--CITY OF HALIFAX PENINSULA AREA MPS POLICIES 1.1.1, 1.5.5, 12.2

This is an appeal from a decision of the Council of the City of Halifax refusing to approve a development agreement to allow the conversion of an existing 4-unit building on Clifton St. to an 8-unit building. Properties on the same side of Clifton St. as the subject lands are zoned C-2 and are subject to Schedule "C" of the Land-Use By-law providing for contract development. The Peninsula North Secondary Planning Strategy will apply to this area if and when approved but at the time of Council's decison was in draft form. The area is designated Commercial in the Generalized Future Land Use policies of the Municipal Planning Strategy (MPS) and in the immediate area surrounding the subject property has a mixture of commercial, industrial and residential uses. The Appellant had applied for a rezoning as well as a contract development, but only the latter was appealed.

HELD: The appeal is dismissed.

Section 72(4) of the Planning Act requires the Board to determine whether Council's decision was reasonably consistent with the MPS. This necessitates an examination of policies in the MPS applicable to the subject property. The Generalized Future Land Use Map and Policy 12.2 indicate that the primary objectives and policies for the area of the subject property are the commercial policies. No policies in the commercial section of the MPS address the issue of residential uses in an area either zoned or designated commercial. Other objectives and policies which are "subordinate" but "shall apply as appropriate" according to Policy 12.2 are residential. No policies in the residential section of the MPS address the expansion of residential uses in a commercial or mixed use area. The MPS provides no easy guidance for an application such as this. The Peninsula North Secondary Planning Strategy which could have assisted was only in draft form. While City Planning Staff cited these draft policies, this is both unwise and unfair since it presupposes the draft would be approved by Council and the Minister without amendment and equates unapproved draft policies with an approved, in-force MPS. The Board should not interfere with the decision of Council which, because of an absence of MPS policy guidance on the discretionary approval of increased residential usage in a commercially designated area, cannot reasonably be said to be inconsistent with the intent of the MPS. The Appellant has not discharged the onus on him.

NSMB-512-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983 Chapter 9;

- and -

IN THE MATTER OF: An Appeal by MONCEF ASKRI from a decision of the Council of the City of Halifax made February 27, 1986 which refused to enter into a develcpment agreement to allow the conversion of a 4-unit building at 2707-2711 Clifton Street to an 8-unit building.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: DANIEL J. CLARKE, LL.B., for the Appellant

BARRY S. ALLEN, LL.B., for the City

DECISION

A hearing was held by the Board on June 9, 1986, at the Expropriations Compensation Boardroom, 1660 Hollis Street, Suite 904, Halifax, on an appeal by Moncef Askri under Section 72(1) of the Planning Act, S.N.S. 1983 c.9, from a decision of the Council of the City of Halifax made February 27, 1986, which refused the Appellant's application for approval of a development agreement for a property at 2707-2711 Clifton Street to allow the conversion of an existing 4-unit building to an 8-unit building.

Notice of appeal (Exhibit A-1) dated March 12, 1986, was received by the Board on the same day. The grounds of appeal as stated in Exhibit A-1 are as follows:

> "1. Council did not give proper weight and consideration to the evidence of the Appellant.
>
> 2. The decision of Council was not based on evidence as presented or placed before it.
>
> 3. The decision of Council was improperly based on considerations outside of the applicable planning criteria.
>
> 4. Council exceeded its jurisdiction and erred in both law and fact in reaching said decision.
>
> 5. Council failed to provide the Appellant with reasons for its decision.
>
> 6. The decision of Council is not consistent with the intent of the municipal planning strategy.
>
> 7. Such other grounds as may appear."

Service of the Notice of Appeal and the Notice of Hearing and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board. With the agreement of the parties the Board assumed jurisdiction to hear the appeal on its merits.

The subject property is located on the east side of Clifton Street, to the north of North Street and south of St. Alban Street. Properties on the east side of Clifton Street are Zoned C-2 and subject to Schedule "C" of the Land-use By-law. The area is in a part of the City to which the Peninsula North Secondary Planning Strategy (PNSPS) will apply if and when approved by Council and the Minister. At the time of Council's decision the PNSPS was in draft form. The area in which the subject property is located is designated Commercial in the Generalized Future

Land Use policies of the Municipal Planning Strategy (MPS). The immediate area surrounding the subject property contains a mixture of commercial, industrial and residential uses.

Evidence at the hearing was given by the Appellant and by a planning technician from the City's Development Department. No other persons attended the hearing to give evidence.

Moncef Askri related his numerous attempts to increase the number of rental units at 2707-2711 Clifton Street. He purchased the property, which he described as a low-rent building "going down", in 1976. He decided to "raise the roof" (add a third storey to the building) in order to get out of rent control. An addition to the building would be exempt from rent control he said. In 1979 he was granted a permit for a 4-unit building and 2 "bachelors" but in 1984 when he applied for a renovation permit he was denied permission to use the 2 "bachelors" and told that he would need to apply for a development agreement in order to use the bachelor apartment units on the third floor.

According to Mr. Askri, he applied "four or five times" to City Council [for a development agreement] and was refused. Eventually, he said, he was given an occupancy permit for 4 apartment units and 5 offices, with the understanding that the offices had kitchens and bathrooms. For 6 or 7 months the "offices" remained empty but after that he decided to rent them as residential accommodation.

Mr. Askri said that although the area was zoned C-2 there were at least six housing units and one 12-unit apartment building in the vicinity of his property. He felt that the building improvements he had made to his property had been good for the neighbourhood.

Mr. Askri believed that Council's refusal to approve his most recent application for both rezoning and a development agreement was based on a proposed future industrial land-use for the area which was not as yet an official policy. [There is an apparent discrepancy between the decision of Council under appeal and the Appellant's dual application for rezoning and a development agreement which is dealt with in detail later in this decision]. The policies and regulations currently in place, he stated, would permit an R-3 use of the property which would in turn allow an R-2A use. He understood hat a development agreement was needed to allow full use of the potential residential accommodation because the property was "short" one parking space. He felt that his rents were low and therefore a majority of his tenants were "on welfare" and so did not own cars r need parking spaces.

In cross-examination Mr. Askri was referred to Section 56(1) of he Land-use By-law for the Peninsula area of the City which outlines ermissable uses in the C-2 General Business Zone. Mr. Askri agreed hat R-2A uses were not listed as permissable uses in the C-2 Zone lthough R-1, R-2, R-3 and C-1 uses were all allowed in a C-2 Zone. He greed that staff had advised him as to what approvals he could apply or but had never told him what the staff recommendation to Council ould be. He acknowledged that when he was unable to rent the additional pace in his building as offices he had rented it as apartments and een prosecuted by the City for this illegal use.

Gary Porter, Senior Planning Technician with the Development epartment of the City, gave evidence on the history of

Mr. Askri's various applications for expanded uses of his property at 2707 - 2711 Clifton Street. Referring to his notes, Mr. Porter recounted the following sequence:

1. In February 1979 Mr. Askri was granted an occupancy permit for a four-unit apartment building and two habitable rooms.

2. In July 1984, Mr. Askri was issued a development permit for a third floor addition and renovation of the building with occupancy to be one unit and one habitable room on the first floor, the same on the second floor and two units on the third floor (the addition).

3. In October 1984, Mr. Askri applied for a development agreement to allow the conversion of the building to 9 units. Staff recommended refusal because of deficiencies according to the R-3 zone requirements which are used as criteria in the evaluation of such an application. Also the application conflicted with the draft Peninsula North Strategy and a portion of the basement was more than 4 feet below grade and so could not be used for human habitation according to the land use by-law. Council refused to enter into this development agreement in December 13, 1984, with no public hearing.

4. In January, 1985 Mr. Askri made a second application for a development agreement for 8 units rather than 9. Staff recommended refusal of this application for the reasons cited for the October, 1984 application. Counsel refused to approve this application on March 20, 1985, with no public hearing.

5. In February, 1985 Mr. Askri applied for rezoning to R-2A and for a development agreement in order to meet the R-2A parking requirements, to allow conversion of the building from 4 units to 8. Staff recommended refusal of this application because R-2A was not considered appropriate for this area, because the proposed use conflicted with the draft PNSPS, because there was insufficient parking and because again a portion of the basement was 4 feet below grade. Council refused this rezoning/development agreement application on May 16, 1985, without a public hearing.

6. In June 1985 a development permit was issued to convert the building to 4 units and offices.

7. In October, 1985 Mr. Askri made the application currently under appeal, "basically the same" as the application made in February, 1985 for both rezoning to R-2A and a development agreement to accommodate

> parking deficiencies. Staff recommended refusal for the same reasons as cited for the February 1985 application. Council held a public hearing on this application however on February 19, 1986 and refused the application February 27, 1986.

Mr. Porter explained that the property if vacant could be developed for commercial uses or a single family dwelling, as of right, but could not be developed with a 2 unit dwelling because of a deficiency in the total area of the lot. The (4-unit) building located on the property is an allowable use but is non-conforming by the R-3 Land Use By-law standards. The Appellant's desired number of residential units for the property (8 or 9) represent an allowable R-3 use but the building and lot fail to meet a majority of the R-3 zone requirements. Mr. Porter reviewed these requirements from an analysis contained in a staff report to Council dated February 24, 1986 contained in Exhibit A-5 concerning the Appellant's 1985 request for conversion to an 8-unit building.

Mr. Porter reviewed as well the staff analysis of the Appellant's most recent application, comparing the proposed 8-unit building to the requirements of the R-2A Zone. In this comparison all requirements were met except that there was a deficiency of 2 parking spaces. Mr. Porter explained that in spite of the application substantially meeting the requirements of the R-2A zone, staff was of the opinion that the R-2A zone was not appropriate for this property or this area which is designated commercial in the MPS. The R-2A Zone, Mr. Porter said, originated in the South End Detailed Area Plan (Secondary Planning Strategy) to encourage infill housing and conversion in a primarily residential area. Staff felt that this zone should only be applied to areas of the City where both the land use designation and the policy goals were similar.

Mr. Porter stated that the Peninsula North Secondary Planning Strategy, which at the time of Council's decision on this application had not yet been adopted, proposed to designate the area in which the subject property is located as Exclusive Industrial/Commercial which"would make existing residential uses non-conforming".

Mr. Porter was asked by Counsel for the Appellant to explain the reason for a positive recommendation for the rezoning from R-2 to R-3 of a property at 6130-6142 Lady Hammond Road contained in a staff report dated February 12, 1986 (Exhibit A-10) even though the land use in the area was described as "a mix of residential, commercial, industrial and undeveloped land." Mr. Porter commented that the Lady Hammond Road property was located on a major street where higher residential density would naturally be encouraged in comparison to a small side street such as Clifton Street; that there was a higher proportion of existing residential uses and some existing residentially zoned areas in the mixed uses of the area on Lady Hammond Road; and that the development proposed for the Lady Hammond Road property, unlike the subject, could meet the requirements of the R-3 Zone.

Mr. Porter clarified that the Lady Hammond Road property in question is covered by Schedule "L"; the subject property is subject to Schedule "C". Unlike the area of the subject property, the area of the Lady Hammond Road property referred to in Exhibit A-10 is not covered by the draft Peninsula North Secondary Planning Strategy. According to Mr. Porter, the intent behind Schedule "C" in the Land Use By-law was to acquire a control mechanism until detailed planning (PNSPS) was completed in that area. Schedule "C" however was the end result of a planning review of a designated "soft" area, and was intended to encourage controlled industrial development in that area.

Under cross-examination Mr. Porter acknowledged that the R-2A Zone is applicable throughout the peninsula area of the city "where there are policies to support it" and that two parking spaces was a very small deficiency compared to the deficiencies in other applications which received Council approval. Mr. Porter considered the R-2A Zone to be applicable to this area but not appropriate.

Before considering the evidence adduced at the hearing and the post-hearing briefs submitted by Counsel, the discrepancy between the Appellant's application and Council's decision needs clarification. This appeal appears to have been filed as a result of a decision of Council which refused to enter into a development agreement. This is substantiated by the

Notice of Appeal (Exhibit A-1) which states:

> "Moncef Askri ..... hereby appeals from the decision of the Halifax City Council .... made the 27th day of February, 1986, which decision refused the Application of the Appellant for a contract development for lands at 2707-2711 Clifton Street which would permit the conversion of the existing 4 unit building to 8 units under Section 72 of the Planning Act."

The staff report to Council dated November 13, 1985 (at the time of Council's first encounter with the application which it subsequently refused) resulting in this appeal, describes the application as one for "contract development" although it refers to an attached staff report of April 15, 1985 "setting out the proposal" which describes the application as both a rezoning request from C-2 to R-2A and an application for contract development.

A copy of a letter, to the applicant from E.A. Kerr, Acting City Clerk, dated March 5, 1986 contained in Exhibit A-5 advising him of Council's decision of February 27, 1986, states that Council ..... "approved the following resolution":

> "That the application for contract development, lands of Moncef Askri, 2707-2711 Clifton Street to permit conversion of the existing 4-unit building to 8 units, be refused by City Council".

The letter stated that extracts of minutes of that Council meeting were enclosed (also contained in Exhibit A-5) signed by E.A. Kerr as "a true extract", which convey the resolution approved by Council as follows:

> "MOVED by Alderman Meagher, seconded by Alderman O'Malley that the application for contract development, lands of Moncef Askri, 2707-2711 Clifton Street to permit conversion of the existing 4-unit building to 8 units, be refused by City Council".

Exhibit A-6, a copy of a portion of the verbatim record of the same Council meeting, signed and certified by E.A. Kerr to be "a verbatim taken from a tape recording from the City Council meeting of February 27, 1986" ..... records Alderman Meagher's resolution as follows:

> "Alderman Meagher: Your Worship, I would like to move that the rezoning from C-2 to R-2A and the Contract Development of the lands of Mr. Moncef Askri at 2707-2711 Clifton Street to permit the renovation of the existing four unit building to eight units be refused by City Council."

The Board is satisfied that this verbatim establishes that the decision of Council did address completely the Appellant's dual application for both rezoning and a development agreement rather than dealing only with the development agreement application as was conveyed to the applicant and as recorded elsewhere in the documents filed at the Board's hearing.

Although Council's decision under appeal refused both to rezone and to approve a development agreement, only the latter decision was appealed. In such an appeal the Board is governed by Section 72(4) of the Planning Act which states:

> "72(4) The Board shall not interfere with the decision of the council pursuant to the Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipal planning strategy, in which case the Board shall

> (a) refer the matter back to the council;
>
> and
>
> (b) instruct the council to hold a public hearing in accordance with Section 42, if this had not been carried out prior to the appeal being made by the applicant."

The requirement that the Board determine whether or not Council's decision was reasonably consistent with the MPS necessitates an examination of policies applicable to the subject property in effect at the time of Council's decision.

The subject property which is zoned C-2 may as-of-right be developed for R-3 uses. Further, R-2A uses are allowed as-of-right in an R-3 zone and therefore are permitted in a C-2 zone. Since the subject property cannot meet the requirements of either the R-3 or the R-2A zone, a development agreement (permissable because the area is covered by Schedule "C" in the Land Use By-law) must be approved to allow an increase in the number of residential units beyond the existing four. Schedule "C" states that "Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this By-law, provided that no approval shall be given inconsistent with the Municipal Planning Strategy....".

The commercial designation of the area in which the subject is located derives from Map 9 in the M.P.S. which illustrates the Generalized Future Land Use. Map 9 refers to "Policy Set 12" in the M.P.S. Policy 12.2 in Section II states:

> "12.2 The areas of future land use shown on Map 9 shall be determined primarily by the objectives and policies which correspond

> to the primary use shown. All other objectives and policies shall apply as appropriate, but shall be subordinate to the primary objectives and policies."

The primary objectives and policies for this area are the commercial policies. No policies in that section of the MPS address the issue of residential uses in an area either zoned or designated commercial.

The other objectives and policies which are "subordinate" according to Policy 12.2, but "shall apply as appropriate" are residential objectives and policies. No policies in the Residential Environments Section of the M.P.S. appear to address the expansion of residential uses in a commercial or mixed use area. The residential policy perhaps most applicable to the proposed use for the subject property appears to be Policy 1.1.1 of the City-Wide objectives and Policies in Section II of the M.P.S. which states:

> "On the Peninsula, residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighbourhoods; and the City shall develop the means to do this through the detailed area planning process."

The "existing neighbourhoods" referred to in this policy are not specifically defined as residential neighbourhoods. The vehicle for the encouragement of residential development - a detailed area plan or secondary planning strategy - was not available for Council's guidance in considering this application for rezoning and a development agreement. Among the policies in the M.P.S. which deal with the secondary planning strategy process is Policy 1.5.5 of Section II which states:

> "For those areas identified in Policy 1.5.2 above, which are not predominantly residential in use, the City shall use the appropriate policy guidance in this Plan."

Policy 1.5.2 referred to above sets out areas for which detailed planning should be prepared. The Board heard evidence about other existing residential uses in the area of the subject property but heard no evidence that the area was "predominantly residential in use." Policy 1.5.5 brings the consideration of policies in the M.P.S. back full circle to the designation of the area as Commercial in the generalized future land use map, requiring the "appropriate policy guidance" in the M.P.S. to correspond with the primary use which is designated commercial.

The Board agrees with the following statements in the brief submitted by Counsel for the City:

> " This case is one .... where there are no specific policies of the M.P.S. offended by Council's decisions, nor are there policies specifically in support of the decision. Furthermore, there may be no specific policies which would be offended had Council decided in favour of Mr. Askri. The Board is left to extract the "intent of the M.P.S." by reading the policies as a whole."

The Board agrees as well with the following points made by Counsel for the Appellant in his posthearing brief, as follows:

> "(1) The application was not to construct a new residential structure but to expand one (infilling);
>
> ....
>
> (3) The application was deficient by a mere two parking spaces;
>
> (4) The R-2A zone is permitted in a C3 zone;

> (5) The application was not inconsistent with the City Planning Laws in existence."

In summary, the M.P.S. provides no easy guidance for an application such as this. The Peninsula North Secondary Planning Strategy which could have assisted both Council and the Board was in draft form only at the time of Council's decision. City Planning Staff cited draft policies of the PNSPS as one reason for its recommendation against the approval of the Appellant's application. The Board believes that reason to be both unwise and unfair since it presupposes that the draft PNSPS would be approved by Council and the Minister without amendment, which is an unpredictable outcome, and it equates unapproved draft policies with an approved, in-force municipal planning strategy.

In conclusion the Board determines pursuant to Section 72(4) of the Planning Act that it should not interfere with the decision of Council which, because of an absence of M.P.S. policy guidance on the discretionary approval of increased residential usage in a commercially designated area, cannot reasonably be said to be inconsistent with the intent of the Municipal Planning Strategy. In the opinion of the Board, the Appellant has not discharged the onus on him to prove that Council's decision was inconsistent with the M.P.S. The Appeal is dismissed.

The Board notes in passing that the reasons for Council's decision required to be provided to the Applicant by Section 72(2) of the Planning Act have been provided by the following statement in a letter to the Applicant:

> " The reasons for refusal are contained in the enclosed Staff Report dated November 13, 1985 and City Council Minutes dated February 27, 1986."

The Board considers this inadequate compliance with Section 72(2) of the Act since (1) the Staff Report of November 13, 1985 contains no reasons for a recommendation of refusal by Staff but refers to an earlier Staff Report of April 15, 1985, originally enclosed, which does set out reasons; (2) the extract of the Minutes of the Council meeting of February 27, 1986 inaccurately sets out the motion of refusal passed by Council, and (3) the applicant may or may not be able to glean from this information the reasons why Council refused his application.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of December, A.D., 1986.

E A Salton

ELIZABETH SALTON
Vice-Chairman

Ummat v. City of Dartmouth

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-1 TO R-2--WHETHER "REFUSAL"--WHETHER REASONABLY CARRIES OUT INTENT OF MPS--WHETHER "UNDUE HARDSHIP" OR "EXTRAORDINARY AND COMPELLING CIRCUMSTANCES"--PLANNING ACT, SS. 43, 51(1), 59(4), 60(1), 63(1)(b),(3),(4),(5),(7)--CITY OF DARTMOUTH MPS POLICIES G-1, G-4, H-5, H-6, IP-1

This is an appeal from a decision of the Council of the City of Dartmouth refusing to rezone the Appellant's property from R-1 (Single Family Residential) to R-2 (Two Family Residential). The subject property is a vacant lot, approx. 50 ft. by 102 ft., located on a street a short distance north of the Angus L. MacDonald Bridge. It lies at the eastern end of an area zoned R-1 and abuts R-1 properties on the south and west. The area immediately adjacent to the east is zoned R-2. The property was zoned R-2 in 1975 when the Appellant purchased it and was rezoned R-1 in 1981. The subject area is covered by a Municipal Planning Strategy (MPS).

HELD: The Board confirms the decision of Council. The appeal is dismissed.

Section 63(3) of the Planning Act requires the Board to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy." This is the major issue in the case. There is a restriction placed on the Board by s.63(5) not to allow the appeal unless the decision cannot reasonably be said to carry out the intent of the MPS. Before addressing the major issue, the Board notes that the Appellant purports to appeal the decision Council made on June 19, 1984. The motion to rezone on the date resulted in a 6-6 tie vote with the mayor not voting. The motion was declared to be defeated. On Sept. 25, 1984 the mayor "cast his vote to break the tie." In the Board's opinion as a result of the tie vote on June 19 there was in law a refusal by Council to rezone and thus the Appellant properly exercised his right to appeal. By reference to ss. 60(1), 59(4), 51(1) and 43(1), the Planning Act provides in effect that an amendment to a land-use By-law can only take place after "a majority vote of the whole council." For Dartmouth Council this requires 8 votes and therefore a 6-6 tie is a refusal. The mayor's vote could not have resulted in a majority vote of the whole Council. On the merits of the decision, the Board from the evidence and a perusal of the MPS agrees that the proposed rezoning to R-2 was within the intent of the MPS. Council, if it so desired, could have approved the application and its decision would have reasonably met the intent of the MPS. Council did not approve the application and its decision in refusing to approve was also a decision that reasonably carries out the intent of the MPS. Council was not under an obligation or duty to approve the application simply because to do so could reasonably be said to carry out the intent of the MPS. It is not sufficient for the Appellant to show that the proposed application to rezone meets the intent of the MPS. For the Appellant to succeed the Board must make a determination pursuant to s. 63(5) that Council's decision cannot reasonably be said to carry out the intent of the MPS. The Board is not able to make such a determination. The Appellant also has not suffered undue hardship and there are no extraordinary and compelling circumstances. He has not discharged the onus on him of proving hardship to a balance of probabilities. There may have been hardship when the property was down-zoned in 1981 but this was not "undue." Also s.63(7) was not enacted until 1983 and so would not apply to a rezoning decision in 1981.

NSMB-456-84-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1982, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **DR. S.K. UMMAT**, from the decision of the Council of the City of Dartmouth, made June 19, 1984, rejecting the Appellant's application to rezone property situate at 20-22 Dawson Street in the City of Dartmouth.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: MICHAEL C. MOORE, LL.B., for the Appellant, **DR. S.K. UMMAT**;

SUZANNE HOOD, LL.B., for the City of Dartmouth.

DECISION

This is an appeal by **DR. S.K. UMMAT** of Dartmouth pursuant to Section 63(1)(b) of the Planning Act from the decision of the Council of the City of Dartmouth made June 19, 1984, rejecting the Appellant's application to amend the City's Land-Use By-law by rezoning his property consisting of a vacant lot known as Civic No. 20-22 Dawson Street in the City of Dartmouth from R-1 (Single Family Residential) Zone to R-2 (Two Family Residential) Zone.

The Appellant's Notice of Appeal is dated July 10, 1984, and was received by the Board on July 11, 1984. It was signed by Frederick E. Clark as Solicitor for the

Appellant. The Appellant subsequently retained the services of F.B. Wickwire, Q.C., who on behalf of the Appellant requested the Board to postpone the hearing of the appeal while the Appellant was in the process of endeavouring to obtain from the City a development agreement respecting the subject property. The Board with the consent of Mr. Wickwire on behalf of the Appellant and Ms. Hood on behalf of the City set down the appeal for hearing for May 21, 1986, since the Appellant's efforts to obtain a development agreement had not come to fruition. On May 2, 1986, Mr. Wickwire wrote to the Board advising that he no longer represented the Appellant. The hearing scheduled for May 21, 1986, was adjourned without day.

On May 26, 1986, the Appellant personally wrote to the Board requesting that the hearing of his appeal be extended to October or November, 1986. On June 3, 1986, Ms. Hood, Solicitor for the City wrote to the Board "strenuously" objecting to a postponement of the hearing to October or November, 1986, and indicated a preference for an August date for the hearing which would allow the Appellant sufficient time to carry out "fresh research" and obtain proper legal and technical advice. On June 6, 1986, the Board wrote to the Appellant advising him that August 6, 1986, would be the hearing date. The Appellant wrote to the Board on June 17, 1986, advising that September 18 - 19th would be preferable dates as he "would be away in August 1986, due to uncontrollable circumstances...".

The Clerk of the Board contacted Ms. Hood by telephone and she agreed to a hearing date of September 18, 1986, which was the date of the actual hearing. Dr. Ummat retained the services of Michael Moore, Barrister, who appeared at the hearing on behalf of the Appellant.

Counsel were in agreement that the Appeal was properly before the Board. The Board being satisfied that all preliminary procedures and advertising had been properly carried out assumed jurisdiction to hear the appeal on the merits.

Seven witnesses gave evidence. They were the Appellant Dr. S.K. Ummat, Donald A. Bayer, Glen L'Esperance, Peter A. Newbould, Warren F. Hirschfeld, John Gully and Chris Lowe.

Dr. Ummat was the first witness to testify. He stated that the subject property is jointly owned by him and his wife and was purchased in December of 1975. He marked the location of this property with a red "X" on a copy of the City's Zoning Map filed as Exhibit U-8. The subject property, approximately 50' x 102' in size, is located a short distance north of the Angus L. MacDonald Bridge on the south side of Dawson Street across the street from the southwest corner of Victoria Park and the southern end of Bligh Street. It lies at the eastern end of an area zoned R-1. The area immediately adjacent to the east is zoned R-2 and the properties abutting the subject property on the south and west are zoned R-1.

The Appellant pointed out that this property was zoned R-2 when it was purchased in 1975. He said that he had always intended to build a side-by-side semi-detached duplex on this property. He stated that in November of 1976 he had made application to the City of Dartmouth for a building permit to construct a semi-detached duplex building on the subject property. A photocopy of this application was filed as Exhibit U-9. This application received approval from the Building Inspector but construction never got underway and the permit expired. The Appellant identified Exhibit U-10 as a copy of the plans for his proposed duplex building which he had submitted to the City.

The Appellant stated that the subject property had been included in a large tract of land forming a neighbourhood Improvement Program (NIP) area which had been rezoned in 1981 from R-2 to R-1. He identified Exhibit U-11 as a copy of a staff report prepared by the City's Planning Department in July of 1981 which recommended that the City Council approve the rezoning of lands including the subject property in an area known as the North End Improvement Area from R-2 to R-1.

The Appellant stated that on June 19, 1984, when his application to have the subject property rezoned to R-2 was brought to a vote, the motion to rezone resulted in a tie vote and the motion was declared to be defeated.

The minutes of the Council meeting for June 19, 1984, as shown in Exhibit U-6, state at page 5 that:

> "The vote was taken on the motion and the necessary majority of the whole Council was not received in order for it to carry; a 6-6 tie vote resulted (Ald. Hawley having left the meeting after the first item). The motion was therefore declared to be defeated."

The Appellant said he wasn't present at a subsequent Council meeting held on September 25, 1984 when the Mayor cast the deciding vote against the motion to rezone.

The Appellant referred to a staff report dated June 12, 1984, from Donald A. Bayer, the Director of Planning and Development to the Mayor and Council which recommended approval of the requested zoning amendment. This report was filed as Exhibit U-5. The Appellant stated that he agrees with the report. Attached to the Exhibit is:

(1) a sketch showing the location of the property in question and the proposed zoning;

(2) a report to the Mayor and Council dated May 9, 1984, from Cathy Spencer, a Planning Technician in the City's Planning & Development Department, respecting a "Neighbourhood Information Meeting" held on May 2, 1984, respecting the Appellant's application;

(3) a report dated April 9, 1984, to the Mayor and Council signed by Glen L'Esperance, the Development Officer and Donald A. Bayer, the Director of Planning stating that the Appellant's "proposal is consistant with the policies of

the Municipal Planning Strategy" and that "The Planning Department is in support of this application".

(4) a copy of the Appellant's letter to Mr. L'Esperance dated March 22, 1984, requesting a change in zoning for 20 - 22 Dawson Street to R-2 zone;

(5) a copy of a sketch showing the subject site and the existing zoning; and

(6) a copy of a Plot Plan prepared by Gary S. Parker, N.S.L.S. showing the location of a proposed foundation wall at 20 and 22 Dawson Street.

The Appellant next referred to the minutes of a meeting of the City Council held on September 25, 1984. At this meeting the Council considered a report from the City's Solicitor respecting the procedure followed during the public hearing relating to the Appellant's application to have his property at 20-22 Dawson Street rezoned from R-1 to R-2. A portion of these minutes set out on page 10 reads as follows:

> "At that time, during first reading of By-law C-529, a 6-6 tie vote resulted on the understanding that a majority vote of the whole Council was required to pass first reading, the motion was declared to be defeated. It has since been established that only a majority vote of members present is required in the case of Land-Use By-law Amendments rather than a majority vote of the whole Council. Therefore, in the case of the Ummat application, the tie vote should have been decided by the Mayor casting the deciding vote to give the simple majority needed.

> The Solicitor has now recommended that the Mayor cast the deciding vote on this matter, since in fact, the by-law is still considered to be in first reading and not resolved one way or the other."

The minutes of the Council meeting held September 25, 1984, indicate on page 11 that "Having cast his vote to break the tie, the Mayor declared the motion on first reading to be defeated by a vote of 7 to 6".

The Appellant testified that he was present at the June 19, 1984 meeting of the Council and after the vote had been taken on his application and the Mayor having declared the motion to rezone as being defeated the Appellant thought that the voting procedure had been completed and that his application was refused and he had instructed his then solicitor Mr. Fred Clarke to file an appeal which resulted in the Appellant's Notice of Appeal signed by Mr. Clarke as Solicitor for the Appellant dated July 10, 1984, appealing the Council's decision of June 19, 1984. The Appellant's Notice of Appeal is filed as Exhibit U-1. The Appellant stated he was not informed that the Council would again be voting on his application at the meeting held on September 25, 1984, and he therefore did not attend at that meeting of the Council.

On cross-examination of the Appellant by Counsel for the City the Appellant was referred to the plot plan prepared by Gary S. Parker a copy of which forms part of Exhibit U-5. This plan shows the frontage of the subject land as 49.5' wide and the Appellant had testified that his property had a 50' frontage on the street. The Appellant then read from the plot plan which states that the frontage of the lot is "49.5' by deed". He was asked if he was aware of any restrictions on using an R-2 lot for semi-detached rather than for a duplex if it has less than 50' frontage. He said he was not aware of any restrictions.

The next witness called by Counsel for the Appellant was Donald A. Bayer, the Director of Planning & Development for the City of Dartmouth, a position he has held since 1972. He appeared under subpoena. Mr. Bayer is a qualified land use planner. He identified Exhibit U-5 as being a letter from himself to the Mayor and Council to which is attached staff reports respecting the Appellant's application for rezoning. His letter recommends that Council amend its Land-Use By-law by rezoning the subject property from R-1 to R-2 Zone.

Mr. Bayer was asked what he looks for in making a recommendation to Council respecting an application to rezone. He replied that principally he looks at the policies of the City's Municipal Planning Strategy (M.P.S.). He stated that he had been involved in the preparation of the M.P.S. He identified Exhibit U-3 as a copy of the City's M.P.S. and he referred to Policy G-1 on page 18 which states that:

> "It shall be the intention of City Council to retain the development boundary and direct future development to areas that are presently serviceable within it. (See Map 1)".

Mr. Bayer stated that the subject property lies within the development boundary. He then referred to M.P.S. Policy G-4 which states that:

> "It shall be the intention of City Council to investigate the possibilities and options for re-development of areas throughout the City to make better utilization of existing services".

He was asked what costs would be incurred by the City if the rezoning took place and the land was developed as proposed. He replied that there would be no direct costs to the City but there would be some indirect costs for City services such as police and fire protection. He also pointed out that the City would receive additional tax revenue for the proposed development. He pointed out that the M.P.S. under the section entitled "Housing" at page 22 was relevant to the case at hand. The following are extracts from page 22:

> "Policy G-1 from the 'Directions for Growth' chapter states that development shall be directed to presently serviceable areas within the development boundary. Working within this policy there are two general areas where new residential growth can be located:
>
> 1) within existing built-up areas via re-development and infilling;
>
> 2) existing undeveloped sites within the development boundary".
>
> "(1) Existing developed areas within the development boundary.
>
> Policy G-4 again from 'Directions for Growth" section states that Council shall investigate the possibilities and options for redevelopment and infilling of areas throughout the City to make better utilization of existing services. Better utilization in this context is meant to refer to maximizing the use of what is already in place. For example, to maximize

> the use of existing schools before undertaking premature construction of new plants. Another example could be an area which is located such that it can handle additional growth, without tremendous expenditures, as a result of the existing street capacities and/or sewer capacities."

Mr. Bayer stated that the subject property had been zoned R-2 at the time the City's Municipal Development Plan came into effect in 1978. He explained that the "NIP" program was designed to extend the life of older homes. He also said that the 1981 rezoning for the subject area created some non-conforming uses.

Mr. Bayer referred to his letter of June 12, 1984, to the Council (Exhibit U-5) which recommended amending the Land-Use By-law in accordance with the Appellant's application which he indicated was consistent with the policies of the M.P.S. The staff report dated April 9, 1984, attached to Mr. Bayer's letter of June 12, 1984, states in part that:

> "The introduction of new housing units will have a positive effect on the neighbourhood. A two-unit building is compatible with the general area. The adjacent park across the street provides family recreational space. Schools, transit and shopping is near-by".

This report was prepared by Glen L'Esperance, the Development Officer for the City and was signed by him as well as by Mr. Bayer.

Mr. Bayer next referred to the Implementation Section of the City's Municipal Development Plan and in particular to Clause (c) of Policy 1P-1 which after stating that "The Zoning By-law is the principal mechanism by which land use policies shall be implemented" states that:

> "In considering zoning amendments and contract zoning, Council shall have regard to the following:
>
> (1) that the proposal is in conformance with the policies and intents of the Municipal Development Plan;
>
> (2) that the proposal is compatible and consistent with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal;
>
> (3) provisions for buffering, landscaping, screening, and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries;
>
> (4) that the proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the City is to absorb any costs relating to the development;
>
> ii) the adequacy of sewer and water services and public utilities;
>
> iii) the adequacy and proximity of schools, recreation and other public facilities;
>
> iv) the adequacy of transportation networks in, adjacent to, or leading to the development;
>
> v) existing or potential dangers for the contamination of waterbodies or courses or the creation of erosion or sedimentation of such areas;
>
> vi) preventing public access to the shorelines or the waterfront;
>
> vii) the presence of natural, historical features, buildings or sites;
>
> viii) create a scattered development pattern requiring extensions to truck facilities and public services while other such facilities remain underutilized;
>
> ix) the detrimental economic or social effect that it may have on other areas of the City.

(5) that the proposal is not an obnoxious use;

(6) that controls by way of agreements or other legal devices are placed on proposed developments to ensure compliance with approved plans and coordination between adjacent or nearby land uses and public facilities. Such controls may relate to, but are not limited to, the following:

- i) type of use, density, and phasing;
- ii) emissions including air, water, noise;
- iii) traffic generation, access to and egress from the site, and parking;
- iv) open storage and landscaping;
- v) provisions for pedestrian movement and safety;
- vi) management of open space, parks, walkways;
- vii) drainage both natural and sub-surface and soil-stability;
- viii)performance bonds;

(7) suitability of the proposed site in terms of steepness of slope, soil conditions, rock out-croppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors;

(8) that in addition to the public hearing requirements as set out in the Planning Act and City bylaws, all applications for amendments may be aired to the public via the 'voluntary' public hearing process established by City Council for the purposes of information exchange between the applicant and residents. This voluntary meeting allows the residents to clearly understand the proposal previous to the formal public hearing before City Council;

(9) that in addition to the foregoing, all zoning amendments are prepared in sufficient detail to provide:

- i) Council with a clear indication of the nature of proposed developments, and

> ii) permit staff to assess and determine the impact such development would have on the land and the surrounding community."

Mr. Bayer went through each item in the above check list of matters that Council is obliged to have regard to in considering a proposed zoning amendment. He carefully reviewed each and every item in the list and gave his opinion that the proposed rezoning complied with the various check list items. He expressed the opinion that the Appellant's application for rezoning carries out the intent of the M.P.S. and satisfies the policies of the M.P.S.

On cross-examination he was asked if the proposed R-2 use for the subject property would be compatible and consistent with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal. He answered that the proposed R-2 use would be compatible as adjacent uses included the general neighbourhood and not just the immediate one or two lots. He was referred to Policy H-6 on page 24 of the M.P.S. which states that:

> "It shall be the intention of City Council to participate in programs such as N.I.P. and R.R.A.P. with the Federal and Provincial governments to rehabilitate the existing neighbourhoods and encourage the establishment of any other such programs".

Mr. Bayer stated that "participation" was the key element in Policy H-6 but that Council and Planning Staff did not necessarily always agree with the opinion of any one group of participants.

Mr. Bayer expressed the opinion that rezoning the subject lot to R-2 would not destroy the neighbourhood and would not have an adverse impact on the land uses in the immediate neighbourhood of the subject property. He also stated that it would have the effect of providing desirable housing units in a desirable neighbourhood. He also expressed the opinion that two semi-detached dwelling units on one lot did not necessarily mean there would be an absentee owner as it was quite common to subdivide such a lot and each portion could be separately owned and owner occupied. He also expressed the opinion that a minor variance could be approved so that a lot with slightly less than the required frontage for R-2 uses could be subdivided.

Finally Mr. Bayer said that since the subject lot is located immediately adjacent to an R-2 Zone to the east it would be a logical extension of the R-2 Zone if the subject lot were rezoned to R-2. He also stated that in his opinion the proposed rezoning if approved would not cause pressures to be brought on the City to have the R-1 lands in the neighbourhood to be rezoned to R-2.

Glen L'Esperance the City's Development Officer since 1978 was the next witness called by the Appellant. He appeared under subpoena. He identified Exhibit U-15 as a copy of a map showing the "Existing Zoning" for the subject neighbourhood. This is a copy of the same map which forms part of Exhibit U-5. Superimposed on U-15 are numbers indicating the number of dwelling units for each property in the R-1 Zone on the south and north sides of Dawson Street west of the subject property. This map indicates that there is one 2-unit dwelling on the north side of Dawson Street and two 2-unit dwellings on the south side of Dawson Street. It also indicates that there is one 5-unit dwelling three lots to the east of the subject lot in the R-2 Zone. Mr. L'Esperance stated that he had not personally obtained the information about the number of dwelling units added to the Existing Zone Map U-15 but had the information gathered by a planning technician in the Planning Department who in turn obtained it from the Provincial Assessment Office in the City. The Board admitted this exhibit in evidence after an objection was made by Counsel for the City. The Board admitted the Exhibit and Mr. L'Esperance's evidence about it, not as absolute proof of the number of dwelling units in the properties shown, but as evidence that some of these properties have more than one dwelling unit in them.

Counsel for the Appellant next called Peter A. Newbould, the Co-ordinator of Municipal Planning, employed by the Department of Municipal Affairs. His curriculum vitae is filed as Exhibit U-16. The Board accepted Mr. Newbould as an expert in land-use planning. His duties include "the management of the review process of all municipal planning documents for ministerial approval". He stated that he is familiar with the subject property and he has examined the City's M.D.P. in relation to the Appellant's application for rezoning and he expressed his opiion that rezoning the subject property to R-2 is consistent with the M.D.P.

Mr. Newbould stated that he had reviewed the planning report Exhibit U-5 signed by Mr. Bayer and Mr. L'Esperance and he agreed with its recommendation. On cross-examination he agreed that R-1 zoning for the subject property would be equally within the intent of the M.D.P. but in his opinion R-2 zoning is preferable.

Evidence was given by William F. Hirschfeld the owner and resident of property known as No. 9 Jamieson Street since 1950. His property is situate to the west of Windmill Road and to the north of the subject property about four blocks from the subject site. He purchased his property because he liked the area in which he lives and liked his neighbours. He considers his neighbourhood to extend from Lyle Street and the Bridge on the south to Elmwood Avenue on the north. He said his neighbourhood was largely made up of single family homes and includes the subject site. He gave a brief history of the neighbourhood Improvement Program in his area which resulted in the City's decision in 1981 to rezone a large area including the subject site to R-1 zone. He also referred to the Appellant's application in 1984 to have the subject property rezoned to R-2 and expressed his opinion that it would be wrong to allow this rezoning as the subject site is abutted to the west and south by R-1 properties. He also expressed his concern that if the rezoning were allowed it might have a creeping effect by encouraging other rezoning applications in the subject area. On questioning from the Board, Mr. Hirschfeld stated that his own property was far enough from the subject site so that the rezoning would not be injurious to him personally. He further indicated that he was present at the hearing of the appeal not on his own behalf but as Chairman of a former residents group.

John Gully, the owner and resident of property at 5 Jamieson Street testified in opposition to the Appellant. He read from a prepared text filed as Exhibit U-17. This text stated that he had lived on Dawson Street from 1916 to 1939 and he has owned his property at 5 Jamieson Street where he now resides for 45 years. He had been a member of the North End Improvement Area Committee and as such was interested in the re-zoning process. He stated he had taken "a walk through the complete area on my own to see what type of buildings we had in the area covered". He said that "There were approximately 203 single family homes, 35 two family homes, 37 apartment buildings (consisting of 4 to 100 apartments) and approximately 46 other types of buildings or areas which included corner stores, fast food outlets, churches, a bingo parlor, junk yards, liquor store, warehouses, etc.". His conclusion was that there has been a great intrusion of many uses in what had once been a mainly residential area. He was opposed to the Appellant's proposed rezoning to R-2 because he thought it would lead to a further encroachment on the R-1 zoned properties.

Expert planning evidence on behalf of the City was given by Chris Lowe, a Senior Planner employed by U.M.A. Engineering Ltd. He holds a degree of Master of Planning from Queen's University and the degree of Bachelor of Environmental Studies (Honours) from the University of Waterloo. He is a member of the Canadian Institute of Planners. The Board accepted Mr. Lowe as an expert qualified to give evidence in land-use planning. Mr. Lowe prepared a planning report filed as Exhibit U-19. He identified Exhibit U-20 as a L.R.I.S. Map of a portion of the City of Dartmouth which includes the subject area. He had added two coloured boundary lines to the map. The red line indicates the boundaries of the North End Improvement Area and the blue line delineates what he considers to be the bounds of the neighbourhood in which the subject property is located. His neighbourhood area is bounded on the south by the approaches to the Angus L. MacDonald Bridge, on the west by Windmill Road, on the north by Jamieson Street, and on the east by Wyse Road.

Mr. Lowe said firstly he evaluated the historic setting of the subject area and secondly he assessed the City's planning policies and controls governing Dawson Street and the surrounding neighbourhood defined by the blue boundary lines on the map filed as Exhibit U-20, and thirdly he reviewed previous planning programs in this particular area and the larger North End Improvement Area and the concerns and expectations of residents towards increased density and development. Finally, he evaluated urban planning and land-use principles as they relate to stated policies in the M.P.S. He stated that his studies indicate that the subject neighbourhood including the surrounding North End Improvement Area is essentially a stable neighbourhood with very affordable housing. He expressed the opinion that the City's land-use policies and the public participation programs in the area recognize the need for maintaining the subject area in a single family type of environment. He expressed the opinion that this environment has been eroded by increased higher density residential and commercial pressures. He expressed the opinion that if the subject property were rezoned to R-2 that this would not meet the intent of the M.P.S. and would "violate the public participation trust which has been established between local residents and City Council on planning matters and also it would establish a pattern which results in the transition of a long established stable and reasonably priced single family area into a more transient absentee landlord and a higher density area".

Mr. Lowe next referred to the City's M.P.S. (Exhibit U-3) and to page 2 of that document which sets forth that "The overall goal of the plan is to provide an orderly system of growth and development within the City, and in doing so, provide for an environment which will make Dartmouth a pleasant and safe place to live and work". He pointed out that one of the objectives of the plan developed from this overall goal is to have "Public Participation" with the objective "to encourage and provide mechanisms for continued public education and involvement and participation in the planning process within Dartmouth". He then quoted from page 2 of the M.P.S. which states that "Public participation in the Neighbourhood Improvement Program has been one of the main factors for the continued success of this program in Dartmouth. The Public is also invited to participate both formally and informally in zoning matters. This is done mainly through the voluntary hearing process, unique to Dartmouth, and the formal public hearing process required for all zoning amendments". Mr. Lowe then stated the obvious and that is that the public's input should be given serious consideration.

Mr. Lowe then referred to Policies H-5 and H-6 set forth on page 24 of the M.P.S. Policy H-5 states that "It shall be the intention of City Council to encourage and undertake action to assist in the stabilization of the existing housing stock where rehabilitation is feasible". Policy H-6 which indicates Council's intention to participate in programs such as N.I.P. is set forth on page 13 of this decision. He stated that in his opinion Dawson Street and the surrounding area is "not in a deteriorated state". He said neighbourhood stability is reflected by the fact that many residents have lived in the area for many years and this stability is "reinforced by the R-1 zoning".

Mr. Lowe stated that from a study of assessment cards for Dartmouth the average length of property ownership in the R-1 zone in which the subject property is located is about 15 years as contrasted to 2.4 years in the adjacent R-2 zone. He stated that length of tenure in a dwelling is an indicator of stability for a neighbourhood. He also stated that from assessment card data he was of the opinion that a single family dwelling in the subject neighbourhood was in the $50,000.00 to $75,000.00 range which he thought was unique in the metro area.

One of the underlining principles that Mr. Lowe considers important in planning is that the interest of the overall community should have priority over the particular vested or economic interest of the individual. He referred to this principle as one of the "pillars of planning in Canada today."

On cross-examination Mr. Lowe was firm in his opinion that the Council's decision meets the overall intent of the City's M.P.S.

Following the evidence of Mr. Lowe and a noon recess, Counsel presented oral submissions to the Board.

Counsel for the Appellant submitted in summary that the Council's decision not to rezone the subject property did not reasonably carry out the intent of the City's M.P.S. and that there are extraordinary and compelling circumstances present which would permit the Board to allow the appeal under s.s. (7) of Section 63 of The Planning Act which states that:

> "Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

In support of his argument that the Appellant would suffer undue hardship or that extraordinary or compelling circumstances are present, Counsel for the Appellant pointed out that the Appellant has owned the subject property since 1975 when it was zoned R-2 and the Appellant had always intended to build a duplex on it and had actually obtained a building permit in 1976. He also argued that the Appellant was prejudiced by the manner in which the City Council had proceeded in 1981 by rezoning a large tract of land rather than amending the City's M.P.S. Finally he argued that the City Council's handling of the Appellant's application in 1984 by dealing with the application on two different occasions, June 19, 1984, and September 25, 1984, constituted compelling circumstances, since the Appellant was not made aware of the second date when Council dealt with the application.

Counsel for the City in her submission emphasized the importance of the North End Improvement Area Plan a portion of which was filed as Exhibit U-14. She pointed out that this Plan, although not technically a part of the City's M.P.S. is (to quote from the Plan itself) a "Concept Plan and represents an expression of policy for neighbourhood action formulated by the residents of the

North End Improvement Area. The long term purpose of this Concept Plan is to improve and maintain the quality of the physical environment of the neighbourhood and to extend its life as a viable residential area for about fifteen to twenty years." She pointed out that this "Concept Plan" was approved in principle by Council and resulted in the Council's decision in 1981 to rezone a large area including the subject lot to R-1 Zone. She submitted that the Council when implementing the concerns expressed by residents as set out in the Concept Plan was accepting citizen input but was obliged to do so based on policies in the M.P.S. She submitted that the intent of the M.P.S. must be obtained from a number of policies in the M.P.S. and not from any one particular policy.

Counsel for the City submitted that a good deal of evidence had been directed to the question of whether R-2 zoning for the subject site is consistent with the intent of the M.P.S. and she correctly pointed out a further relevant matter, namely that the Board pursuant to Section 63 s.s.(5) of the Planning Act "shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the municipal planning strategy". She submits that Section 63 s.s. (5) "changes the focus on whether or not R-2 is appropriate to whether the decision the Council actually made to leave it R-1 can reasonably be said to carry out the intent of the M.P.S. In our submission, the evidence of all the planners was that regardless of what they said about R-2, that R-1 is consistent with the intent of the M.P.S. and therefore the decision of Council should not be overturned".

This appeal having been brought pursuant to Section 63 s.s. (1) clause (b) of the Planning Act by the Appellant in his capacity as the applicant to the City to have the City's Land-use By-law amended by rezoning property known as 20 - 22 Dawson Street from R-1 to R-2 Zone which was refused by the Council of the City, invokes the provisions of s.s. (3) of Section 63. S.S (3) of Section 63 requires the Board to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy."

S.S. (4) of Section 63 provides that the Board may:

> "(a) confirm the decision of the Council;
>
> (b) allow the appeal by reversing the decision of the Council amending or revising the Land-Use By-law; or
>
> (c) allow the appeal by instructing the Council to amend the By-law in the manner prescribed by the Board".

There is a restriction placed on the Board by virtue of s.s. (5) of Section 63 which states that "The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the municipal planning strategy."

It is therefore clear that the major issue in this case is whether or not the Council's decision in refusing to rezone the Appellant's property reasonably carries out the intent of the M.P.S.

Before addressing the major issue as noted above some comment shall be directed to the Council's decision under appeal. The Appellant's Notice of Appeal filed as Exhibit U-1 purports to appeal the decision Council made on June 19, 1984. It is clear from the evidence and in particular from the Minutes of the Council meeting held on June 19, 1986, that the motion to rezone the Appellant's property resulted in a 6-6 tie vote with the mayor not voting. The motion was declared to be defeated. The Appellant then appealed. It is a fact, as set forth in the Council's minutes of September 25, 1984, that the Mayor on the advice of the City Solicitor, "cast his vote to break the tie" and again declared the motion to be defeated by a "vote of 7 to 6".

It is the Board's opinion that as a result of the Council's tie vote on June 19, 1986, there was in law a refusal by Council to rezone the Appellant's property. Thus the Appellant properly exercised his right to appeal that decision of refusal under Section 63(1)(b). The Planning Act provides in effect that an amendment to a municipality's land-use By-law can only take place after "a majority vote of the whole council". The Planning Act does not state this in simple terms. Section 60(1) of the Planning Act states that a Council may amend a land-use By-law "and the provisions of this Act respecting the adoption of the By-law apply mutatis mutandis to its amendment".

Section 59(4) of the Planning Act provides that "The adoption of a land-use By-law to implement a planning strategy is not effective until approved by the Minister and Section 43 applies mutatis mutandis to the approval of the Minister".

Section 51(1) of the Planning Act provides that the Council "shall, in accordance with Section 43, adopt a land-use By-law before submitting the planning strategy to the Minister for approval".

Section 43(1) provides that "A planning strategy shall be adopted by a majority vote of the whole Council...".

The Dartmouth Council consists of 14 Councillors plus the Mayor. Therefore a majority vote of the whole Council would require at least 8 votes. The 6-6 tie is therefore a "refusal" by the Council to amend the Land-Use By-law under Section 63(1) of the Planning Act. This being so it would seem to the Board that there was no need for the Mayor casting a vote at the September 25, 1984 meeting of Council to break the tie. No matter which way the Mayor might have voted at the June 19, 1984 Council meeting or at the subsequent meeting held September 25, 1984, it could not have resulted in a majority vote of the whole Council. The Appellant thought the Council had disposed of his application by a refusal on June 19, 1984, and he properly filed his appeal based on what he correctly considered was a "refusal" by the Council to approve his application.

It is clear that both Mr. Bayer and Mr. L'Esperance as well as Mr. Newbould were of the opinion that the proposed rezoning of the Appellant's property to R-2 was within the intent of the M.P.S. The Board from the evidence and from a perusal of the Town's M.P.S. agrees with this opinion. Mr. Bayer also was of the opinion that the existing R-1 zoning was within the intent of the M.P.S. and he expressed the oppinion that the R-2 Zone better met the intent of the M.P.S. than the R-1 Zone. Mr. Lowe was of the opinion that the R-2 Zone would not meet the intent of the M.P.S. and that Council's decision in refusing the Appellant's application did meet the intent of the M.P.S.

The City Council when it voted 6-6 on June 19, 1984, following a public hearing on the Appellant's application was obviously divided on the issue of whether or not to approve the application. By its action on June 19, 1984, the Council refused to approve the application which requires a majority vote of the entire council to approve an amendment to the Land-Use By-law. In the Board's opinion based on the evidence adduced at the hearing before the Board, the Council, if it so desired, could have approved the application by a majority vote of the whole Council and its decision would have reasonably met the intent of the

M.P.S. The Council in its wisdom did not approve the application and its decision in refusing to approve the application was in the opinion of the Board a decision that "reasonably carries out the intent of the Municipal Planning Strategy". The Council was not under an obligation or duty to approve the application simply because to do so could reasonably be said to carry out the intent of the M.P.S.

It is not sufficient for the Appellant to show that the proposed application to rezone his property meets the intent of the M.P.S. For the Appellant to succeed the Board must make a determination pursuant to Section 63 s.s. (5) that the Council's decision cannot reasonably be said to carry out the intent of the M.P.S. The Board based on the evidence adduced, the submissions of Counsel, an examination of the M.P.S. and a view of the subject site and surrounding neighbourhood is not able to make such a determination.

The Board has carefully considered the submission made on behalf of the Appellant that the Appellant, as the Applicant to the City for an amendment to the Land-Use By-law, would suffer undue hardship or that extraordinary and compelling circumstances are present which would justify the Board allowing the appeal pursuant to Section 63 s.s. (7) of the Planning Act, notwithstanding the restrictions imposed on the Board by virtue of Subsection (5) and (6) of Section 63. In the opinion of the Board the Appellant has not suffered undue hardship and there are no extraordinary and compelling circumstances present.

The Appellant's property has been zoned R-1 since 1981 and he could have developed the property for R-1 use purposes as of right ever since the 1981 decision of the Council changing the zoning of the property from R-2 to R-1. Prior to the 1981 decision he could have developed the property for R-2 use. The mere fact that the subject property was zoned R-2 when the Appellant and his wife purchased it in 1975 and the fact that it was later rezoned to R-1 in 1981 are not facts which would enable the Board to allow this appeal based on the criteria set forth in Section 63(7) of the Planning Act. S.S. (7) of Section 63 is relatively new having first appeared in the 1983 Planning Act, S.N.S. 1983, Chapter 9. The Appellant may well have suffered some hardship in 1981 when his property was down-zoned from R-2 to R-1 which probably resulted in the subject property becoming less valuable than previously because of the restrictions on its use. It is the Board's opinion that the Appellant did not suffer "undue" that is, "excessive" hardship as the result of the 1981 rezoning or by the Council's refusal to rezone the property to R-2 in 1984. The "undue hardship" and "extraordinary and compelling circumstances" provisions were not enacted until 1983 and would not apply to a rezoning decision which took place in 1981. The Appellant is in the position of many other persons whose properties have been down-zoned because of some policies or policy in a M.P.S. or as a result of the implementation of a N.I.P. program or as in this case the North End Improvement Area Program designed to implement the overall goal of the City's M.P.S. which is "to provide an orderly system of growth and development within the City, and in doing so, provide for an environment which will make Dartmouth a pleasant and safe place to live and work".

As the Board noted in its decision in John J. MacDonald v. The Town of Westville reported in (1985) Vol 4 B page 32 of the Board's Decisions, s.s. (7) of Section 63 of the Planning Act provides that the Board "may" rather than the mandatory "shall" allow an appeal under s.s. (7) which means that the Board must exercise a discretion in applying the provisions of this clause. In the Board's opinion the Appellant has not suffered undue hardship nor were there extraordinary and compelling circumstances present which would enable the Board to exercise its discretion and invoke the provisions of s.s. (7) of Section 63 so as to allow the appeal.

The Board in its decision dated July 9, 1986, respecting an appeal by Ruth G. Black from the decision of the Council of the Town of Amherst commented on the s.s. (7) of Section 63 that "the burden of proving 'hardship' to a balance of probabilities is on the Appellant." In the subject case the Board is of the opinion that the Appellant Dr. Ummat, has not discharged this onus.

The Board, therefore, pursuant to Section 63 s.s. (4)(a) of the Planning Act confirms the decision of the Council and the appeal is dismissed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of December, A.D., 1986.

RHBlois

R.H. BLOIS,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD

Union, Meadowview, Bridge and Nottingham Residents' Assoc. v. Town of Bedford

PLANNING--CONTRACT ZONING--APPROVAL OF DEVELOPMENT AGREEMENT TO PERMIT THREE STOREY OFFICE BUILDING--WHETHER "AGGRIEVED PERSON" --WHETHER STANDING BY AGENCY OR ASSIGNMENT--MUNICIPAL BOARD ACT, S. 16(1)--PLANNING ACT, S. 71

This is an appeal by an incorporated residents' association from a decision of the Council of the Town of Bedford approving a development agreement with G.P.P.L. to permit the construction and use of a three storey office building. The Applicant argues that the residents' association is not an "aggrieved person."

HELD: The Board has no jurisdiction to hear this appeal on its merits. The appeal is dismissed.

The Board heard evidence necessary to determine whether or not in this appeal the Appellant corporation is an "aggrieved person" within s. 71(1)(a) of the Planning Act. The Appellant owned no land, had no taxing powers, and in most respects is either in an similar position, or in a weaker position than the Appellant in Riverlake Residents' Assoc. Several arguments were made as to why the Appellant was within the test for aggrieved person set out in Riverlake. One was that if the Appellant did not have standing, its members would lose their perception that the Appellant corporation was a suitable vehicle to represent them and would withdraw their support as members, causing the Appellant injury. Accepting that this would be an injury, that injury would have resulted from some other source than the decision of Council, such as the Legislature in changing the qualification to appeal in 1983 or the action of this Board in finding that the Appellant was not an aggrieved person. The Appellant also was able to fully represent its members before the Council without restraint. Other arguments related to the Appellant being an agent or assignee of persons who were aggrieved. The Notice of Appeal expressed on its face no agency relationship and the Board has no powers to allow amendment to the Notice now to express such agency. There is also no credible evidence before the Board establishing a representative or agency capacity. The Board can find no actual assignment of the "chose in action", being the latent right of appeal of some "aggrieved person" member, even if such an assignment is possible. The Board adopts an approach in interpreting its governing legislation which attempts to ensure that it hears all the appeals before it on their merits if legally possible. Strain as it might, the Board can find no basis for holding the Appellant corporation to be an "aggrieved person." The Board makes no findings, pro or con, as to whether a corporation may qualify as an "aggrieved person' by agency or assignment.

NSMB-529-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **UNION, MEADOWVIEW, BRIDGE AND NOTTINGHAM RESIDENTS' ASSOCIATION,** a body corporate, of Bedford from the decision of the Council of the Town of Bedford made on May 20, 1986, approving the Town's entering into a development agreement with Governor's Place Properties Limited, a body corporate, to permit the construction and use of a three storey office building at 26 Union Street, Bedford.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: FREDERICK V. HALL, and numerous others on behalf of the Appellant, (Union, Meadowview, Bridge and Nottingham Residents' Association);

PETER McINROY, LL.B., for the Town of Bedford, Respondent;

JACK A. INNES, Q.C., for Governor's Place Properties Limited, Developer and Applicant.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, The Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon to hear this planning appeal at the Board's October 30, 1986, sittings at the Bedford Fire Hall, 1247 Bedford Highway, Bedford, Nova Scotia.

This appeal is made by the Appellant corporation

(Union, Meadowview, Bridge and Nottingham Residents' Association), on notice filed with the Board June 4, 1986, and dated June 2, 1986, pursuant to s. 71 of the Planning Act being c. 9, S.N.S. 1983. The Board assigned the Chairman to peruse the Notice of Appeal and the Chairman decided the Notice complied with the Planning Act and the Board's Rules made thereunder. The Appellant corporation undertook to pay the costs of advertising the Notice of Hearing.

The Appeal seeks to have the Board reverse the decision of the Council of the Town of Bedford (hereinafter called the "Town") of May 20, 1986, approving the Respondent Town's entering into a development agreement with Governor's Place Properties Limited, a body corporate, the Applicant, to permit the construction and use of a three storey office building at 26 Union Street, Bedford.

The appeal was heard commencing 7:00 p.m. on October 30, 1986, at the Bedford Fire Hall, 1247 Bedford Highway, Bedford, pursuant to the Notice of Hearing dated the 7th day of October, A.D., 1986.

Service of the Notice of Appeal, the Notice of Hearing, and advertisement of the Notice of Hearing were all proven to the satisfaction of the Board. Service required to be proven by the Appellant corporation was proven by the vive voce evidence of Mr. Frederick V. Hall.

At the commencement of the hearing Mr. Hall, for the Appellant corporation, argued that the Appellant corporation was an "aggrieved person" within the meaning of s. 71(1)(a) of the Planning Act and thus had a right to appeal herein. Counsel for the Town, Peter McInroy, took no position on whether this particular Appellant corporation had the status of an "aggrieved person" herein. He was, however, careful to point out that the Board had no jurisdiction to hear this appeal until it determined that the Appellant corporation was an "aggrieved person" as alleged by the Appellant corporation. Counsel for the Applicant, Jack A. Innes, Q.C., argued that the Appellant corporation was not an "aggrieved person" as alleged and therefore the Board had no jurisdiction to hear this appeal.

After hearing these arguments, the Board, following the direction set out in Northwest Arm Heritage Association NSMB-496-85-P[1], decided to hear evidence necessary to determine whether or not in this appeal the Appellant corporation is an "aggrieved person" within the meaning of s. 71(1)(a) of the Planning Act and thus to determine whether or not the Board has jurisdiction to hear this appeal.

In this appeal there is an Appellant corporation which is the sole signer of the Notice of Appeal. The evidence taken as a whole (much of the evidence is dealt with in more detail later) shows that this corporate Appellant owned no land, had no taxing powers, and in most respects is either in a similar position, or in a weaker position, to establish itself as an "aggrieved person" than was the corporate Appellant in Riverlake Residents' Association v. County of Halifax (1985) 4 (B) M.B.D. 122[2]. The headnote of Riverlake [2] at page 123 has this to say on the subject of "aggrieved person":

> "The Appellant corporation has not shown that it is an 'aggrieved person' by reason of having suffered a legal grievance or the imposition of a burden or obligation, or by reason of a denial of some personal or property right... It is not sufficient for the Association to claim that if any of its members are aggrieved, it has an agency or representative capacity to represent them and therefore is itself an aggrieved person. ..."

The Supreme Court of Canada dealt with the "aggrieved person" status of a corporate appellant involved in planning matters in the case of L'Association des Proprietaires des Jardins Tache Inc. et al v. Les Enterprises Dasken Inc. et al 26 D.L.R. (3rd) 79 [3]. The corporate appellant was a non-profit company incorporated by letters patent and having as two of its objects:

> "3. To secure the welfare and look after the interests of property owners ... In Tache Gardens.
>
> 4. To promote and safeguard the interests of property owners ... make representations to public agencies for this purpose, and take any other useful steps."

These powers are at least as extensive as those possessed by the present Appellant corporation. Yet Pigeon J., for the majority of the Supreme Court, at page 86 has this to say:

> "...This organization is not entitled to exercise the rights of its members. It does not claim any other capacity than that conferred by its incorporation under... the Companies Act. It does not describe itself as a property owner, alleging only that its members are property owners ...[it is not empowered] by another statute which

> conveys a provision of giving it special powers to exercise the rights of its members with respect to certain acts prejudicial to the collective interest. Nothing of this sort is to be found in the statute governing the Association."

This case supports the position taken by the Board in Riverlake [2].

Energy Probe v. Atomic Energy Control Board (1984) 2 F.C. 227 [4], also cited in argument by the Appellant corporation, is not helpful to the Appellant's allegations. That case dealt with the power of a court to grant standing in a certiorari matter and said, in effect, that in the peculiar nature of a certiorari matter a court had a discretion to allow a person other than an aggrieved person standing in an appropriate certiorari matter (a discretionary matter in itself). In the present appeal the Board is not a court within the meaning set out in Energy Probe [4] and has no inherent jurisdiction, as a court may have, to grant some discretionary status to a party who is not an aggrieved person. The Board is limited by statute and can only allow "aggrieved persons" to initiate appeals to be heard before it.

The Appellant corporation sought also to rely on the decision of Cowan CJTD in Heritage Trust v. PPAB 1981 S.H. No. 32307 & S.H. No. 28757 [5] as an authority to support the proposition that the Board should in this appeal find the Appellant corporation to be an "aggrieved person". At page 27 of that decision, after citing from Brant Dairy Co. v. Milk Commission of Ontario (1973) S.C.R.

131 [6], Cowan CJTD holds:

> "Applying the same reasoning in this case I come to the conclusion that the Plaintiffs, assuming that they had a right of appeal under s. 540 of the [Halifax City] Charter, have not lost their right to bring an action for an order in the nature of certiorari, by reason of their failure to lodge such an appeal [under s. 540 of the (Halifax City) Charter]."

For a court to rely on an individual's expired right to make a planning appeal as a foundation on which to find the individual an "aggrieved person" capable of maintaining an action in the nature of a certiorari (arising out of the same circumstances as the expired planning appeal) before that court is much different than saying this Board can extend the time for appeal in planning matters, statutorily set, once that time has expired. Cowan CJTD still had time to consider parties for certiorari. Once appeal times have expired the Board can give no status to the former holders of those rights. Heritage Trust [5] thus does not advance the Appellant's claim to be an "aggrieved person".

At first blush, the issue of "aggrieved person" in this appeal should be disposed of quickly in favour of the Applicant developer since the evidence bearing on the Appellant's status as an "aggrieved person" is either on all fours with the evidence accepted in Riverlake [2] or is weaker (and thus militates against) any finding herein that the Appellant corporation directly and in its own right is an "aggrieved person". This first impression is accurate so far as it goes and, subject to the qualifications contained in the next sentence of this decision, the Board finds that the evidence tendered to it in this hearing gives it no reason to depart from making the same finding that was made in Riverlake [2], namely that the Appellant corporation herein is not an "aggrieved person" and therefore this Board has no jurisdiction to hear this appeal on its planning merits. The Appellant corporation however says that the Appellant corporation is an "aggrieved person" in all or one of the following aspects (anyone of which the Appellant corporation argues make the Appellant corporation an "aggrieved person"):

1. The Appellant corporation is an "aggrieved person" directly and in its own right in accordance with the theory outlined in the evidence of Dr. Christensen-Ruffman set out and considered in some detail infra;
2. The Appellant corporation is an "aggrieved person" directly and in its own right as an assignee of the appeal rights of others who were "aggrieved persons" at the time of the filing of the Appellant's Notice of Appeal;
3. The Appellant corporation is an "aggrieved person" as duly appointed agent of various members who were "aggrieved persons" at the time of the filing of the Appellants' Notice of Appeal.

If the Appellant corporation cannot fit itself within one of the above submissions then the Board must find that the Appellant corporation has no status as an "aggrieved person" and thus the Board would have no jurisdiction to hear this appeal on its planning merits. The main thrust of this decision is to deal with these three submissions and to see whether under any one or more of them it can find that the Appellant corporation is an "aggrieved person" and thus establish the Board's jurisdiction to hear this appeal on its planning merits. First the Board will summarize what it believes to be the pertinent positions brought out in the testimony of the various witnesses. Then the Board will deal, to the extent necessary to dispose of this appeal, with the three submissions of the Appellant corporation.

On the issue of "aggrieved person" the Appellant corporation called as its witnesses Vernon Banks, Dr. Christiansen-Ruffman, Shirley Towill, Debra Cooke, Richard Collins, Francene Cosman, Gordon Burris, Bill Richards, Douglas A. Tigewell, Donald Isnor, Kenneth Smith, and Margaret Chapman. The Town called no evidence on the issue of "aggrieved person". The Applicant called Allan Joseph Boudreau.

Before going further with the issue of "aggrieved person" the Board finds it useful to summarize the evidence of some of these witnesses.

Vernon Banks was the first witness to testify for the Appellant corporation. Mr. Banks is a construction estimator and resides at 52 Union Street, Bedford, and is a member of the Appellant corporation. He expressed the opinion that the development envisaged by the proposed development agreement is at variance with the intent of the Town's Municipal Planning Strategy (MPS) as the proposal is incompatible with the adjacent uses and the existing development form in the area in terms of use, bulk, and scale and that there is insufficient buffering and screening to reduce potential incompatibility with adjacent land uses. Mr. Banks says the uses surrounding 26 Union Street are all R-1 residential uses and the zoning of the lot itself and all the surrounding area is R-1. Office building construction on 26 Union Street is not compatible with the surrounding residential single family use. Mr. Banks introduced several drawings prepared by himself to illustrate the opinions he had offered. Mr. Banks says that the highest part of the office building proposed for 26 Union Street is 46' above grade. The height of the average house on Union Street is approximately 19' above grade according to his calculations made from the plans of the proposal at the Town Planning Office.

Mr. Banks attended the meeting of the Appellant corporation at which the Appellant corporation decided to initiate this appeal. He didn't know if the Appellant corporation was to be representative of any particular properties or property owners in the appeal but he didn't think there was any such specification made or discussed at the meeting. Mr. Banks said under 20 persons attended this meeting and he estimates there were 150 "houses" eligible to send persons who could join the membership of the Appellant corporation and then to attend and to vote at the meeting.

Dr. Linda Christiansen-Ruffman, 202 Ferguson's Cove Road, Halifax County, the Appellant's next witness, holds a Ph.D. degree in Sociology from Columbia University, in New York. In 1976 she became a full professor in Sociology at St. Mary's University in Halifax. She stated she was an expert in community sociology, public participation, urban sociology, citizen participation. Dr. Christiansen-Ruffman teaches, or has taught, courses in Research Methodology, Social Policy, Urban Sociology, and has conducted seminars in Citizen Participation, Sociology of Communities, and a remedial course in Women in Communities. Dr. Christiansen-Ruffman has "been involved" with TUNS in both Planning and Architecture and with the NSCAAD in Environmental Studies. In those situations she has given various seminars during which she was "called upon" to supervise theses and to evaluate projects and to participate in architect's studies.

Dr. Christiansen-Ruffman has conducted research in public participation in planning, community sociology, women's community participation. Some years ago Dr. Christiansen-Ruffman did research on the first 60 cases decided by the Provincial Planning Appeal Board (PPAB) in the years 1970-1976. Her research has been published in various "journals and books" and presented at various national and international conferences. Dr. Christiansen-Ruffman has acted for various firms as a consultant and she has received various grants to support her diverse research projects.

After cross-examination by counsel for the Town and counsel for the Applicant the Board ruled that Dr. Christiansen-Ruffman was an expert in Sociology entitled to give opinion evidence in that discipline before the Board.

Dr. Christiansen-Ruffman expressed the view that the Appellant corporation was a body made up of residents recognizable as a group with a very prime objective of opposing this particular development to the extent that the body would be perceived by the individuals comprising it as being a superior vehicle for forwarding their opposition to the proposal on its planning merits before the Board (as opposed to one or more of them pursuing their individual appeals on the planning merits of those appeals). If the Board did not hear the appeal herein on its planning merits but dismissed the appeal on the "technical grounds" that the Appellant corporation was not an "aggrieved person" then the members would lose their perception that the Appellant corporation was a suitable vehicle for pursuing their prime imperative and would withdraw their support as members in the Appellant corporation. Without membership the purpose of the Appellant's existence would diminish or fail. This diminishment or failure of the Appellant corporation would be, in the opinion of Dr. Christiansen-Ruffman, the loss of a legal right or injury to the Appellant corporation which would qualify the Appellant corporation to be an "aggrieved person" and would thereby entitle the Appellant corporation to be a qualified Appellant corporation in this appeal. Dr. Christiansen-Ruffman's evidence went into much more detail than is dealt with here but this summary is what the Board considers to be the thrust of her opinion.

Shirley Towill, 71 Union Street, Bedford, introduced Exhibit U-21, which she said was a list of residents who would withdraw from membership in the Appellant corporation if it were not granted aggrieved status in this appeal. When she first understood that the Appellant corporation would first have to qualify itself as an "aggrieved person" before it could begin to prove the merits of this appeal, she, personally, began to lose faith in the organization and thus her interest in continuing her membership therein.

Debra Lynn Cooke, 29 Union Street, Bedford said she lives in her own home (a single family dwelling on an ordinary size house lot) across the street from 26 Union Street. Her back property line is the Sackville River and across the river is Bedford Towers, a multi-storey office tower. She believes herself to be personally aggrieved by the decision of Council complained of herein because her enjoyment of her property and its privacy will be restricted. Mrs. Cooke believes that the market value of her property will be diminished by the effect of the decision of Council complained of herein. Mrs. Cooke says she will be less able to enjoy her property during the confusion caused by the construction phase of the proposed project on 26 Union Street. She is a member of the Appellant corporation.

In the course of her direct testimony she was then asked:

> Q. "Is the residents' association, would you say, acting on your behalf?
> A. Yes, I would say so.
> Q. Are you saying the association is acting as your agent in this matter?
> A. Yes. I am part of the association so -
> Q. Um-hum...
> Q. Did you think the U.M.B. Residents' Association was appealing on your behalf?
> A. Aah.
> (Board interjection) There is a thing such as leading questions, now, in such a way, there is no objection has been made. You can lead in such a way that you destroy the credibility of the answer. In other words...
> Q. Allright, I will rephrase that.
> (Board interjection) I don't know why counsel isn't objecting but that is their business, but, but a
> (Mr. Innes) By way of explanation, Mr. Chairman, I didn't want to be destructive. I already made my point in respect to this evidence.
> (Board) Well it. Your point may not be perpetually valid.
> That is my only problem. Ah ah I think you will appreciate that I am trying to stretch as far as I can to accommodate the type of preparation that you have to face. I ah. The questions are proper [as topic] but they are much too leading. Do you see, do you see what I have been saying, Mr. Hall, that your questions (cough obliterating sound) left with your answers, not hers (cough) as such may destroy her credibility when she is trying to tell the truth. So that I would suggest that your questions be extremely less leading or be prepared to destroy the credibility of [her answers] by the nature of your questions.
> Q. Okay. Well, I'll just reiterate now. You do feel that the association was acting on your behalf?
> A. Yes.
> Q. Fine.
> ...".

Richard E. Collins, 20 Meadowview Drive, Bedford then testified. He is a three year resident of 20 Meadowview Drive. He, also, believes himself aggrieved by the decision of Council. He, also, is a member of the Appellant corporation.

As to his relationship to the Appellant corporation and its status in this appeal in examination-in-chief he had this to say:

> "Q. Would you say that the association, or is this, is the association acting on your behalf?
> A. Of course it is.
> Q. And ah are you saying the association is acting as your agent in this matter?
> (Objection by Mr. Innes) Mr. Chairman, I-back into the leading questions.
> (Board)...Lead away but you may destroy what you are trying to do with this witness. You may have destroyed already, I don't know till I hear the transcripts again I won't know. Mr. Innes is objecting and unfortunately he is correct. a) it is leading; and b) the danger of a leading question that you may destroy the credibility of the witness himself because he said what you told him to say. You see the danger?..."

Mr. Hall, for the Appellant corporation, at first declined to try to qualify Mr. Collins as an expert in any capacity. He then proceeded to ask Mr. Collins opinions on the development project. The Board stopped that line of questioning. Mr. Hall then asked that Mr. Collins be found by the Board to have "the qualifications to be able to analyse the particular development which could be going into his area that would have a detrimental effect."

Mr. Collins has an Honours B.A. Degree in Drama and English from Dalhousie, an M.A. degree in Drama from the University of Toronto. He teaches at St. Mary's University in the English department. For the last 8 or 9 years he "has been researching work all told "as a student, as a professor, as an associate and as a 'T.A.'" He has had the experience at research that he says he can apply the topic he has researched with integrity. He believes he is qualified as an expert as sought because:

a) He has the skills to research and to document,

b) He also happens to live in the area which increases, in his opinion, his credibility in speaking about the area.

He has no training in office building, in office structures, or in planning. He has written a script on environmental disasters relating to the Sackville River. He says he has a direct financial interest in the outcome of the decision of Council. He has never before given expert testimony before any other tribunal or before any court.

On these facts, the Board was not prepared to hear Mr. Collins as an expert in research qualified to give expert opinion evidence relevant to the present enquiry.

Mr. Collins is a director and a member of the Appellant corporation. He believes himself personally aggrieved by the decision of Council appealed from.

Mr. Collins was, in cross-examination, asked the following questions and made the following answers:

> "Q. As a final question I just want to ask you do you think that the Association was acting on your behalf?
>
> A. Indeed it was.

Q. Could you just tell me why you think that?

A. Well because the Association has strength in numbers. It, itself, is a unit. I, myself, wouldn't have as much clout if I had a mind to fight this thing as an individual. With the strength of the Association as well we are a stronger unit. I agree with them. They agree with me. That's the case right there.

...

Q. Did you personally consider launching an appeal against the decision of Bedford Town Council to grant a development agreement in this project?

A. Yes. If we did not have an association formed around us. Yes.

Q. Did you at any time...?

A. We didn't have to. We already had an association formed.

Q. At any time did you indicate in writing to the Association that you wanted them to represent you?

A. Did I indicate in writing? I'm a director of the Board for the Association.

Q. That's not the question. Did you, in writing, to the Association indicate that you wanted it to represent you at the appeal hearing?

A. I can't recall. ... a specific letter from me? No."

He believes his own home has been devalued by some 4-5 thousand dollars since "the news of this development became public." Mr. Collins says that his house is somewhat smaller than the other homes in the area and very much smaller than the proposed development at 26 Union Street.

Mr. Collins pointed out that a previous development for 26 Union Street, 1/3 smaller than the present proposal in square footage, had been refused by Council and that refusl had been upheld on the developer's appeal to the

Municipal Board.

According to Mr. Collins, the "emergency general meeting" of the Association to authorize its appeal was attended by 16 numbers. The Chairperson didn't vote and there were 14 votes in favour of commencing the appeal. One member abstained.

Francene Cosman, 59 Bedford Hills Road, Bedford Village Subdivision was called to testify. Mrs. Cosman is a homemaker. In January [1987] she will be chairing a task force on the concerns of women in this province and in chairing it will have to, in the words of the witness, display "some considerable degree of capability of judgment". Mrs. Cosman has just recently resigned a full time position as the C.E.O. of the Nova Scotia Advisory Council on the Status of Women. Mrs. Cosman was the first mayor of the Town [1979 - 1982]. Prior to that Mrs. Cosman was the member for Bedford on the Halifax County Council [1976 - 1979]. Before 1976 Mrs. Cosman was on the Bedford Service Commission. She says her area of expertise in planning flows from the above listed experiences and from the following additional experiences:

1. She chaired the planning committee of the Bedford Service Commission [1974 - 1976];
2. When on Halifax County Council she was a member of its PAC and, as such, during the hundreds of meetings of that body became familiar with the planning process as it affected Halifax County.

The Halifax County Council during 1976 - 1979 had a high degree of involvement in planning issues and she participated fully as a member of Halifax County Council in disposing of those issues.

3. As Mayor of the Town [1979 - 1982] she was a member of the planning committee of the Town. She chaired close to 100% of the planning strategy sessions and the hearing that the Town had and the various community meetings that the Town had throughout the Town leading to the adoption by the Town of its "Municipal Development Plan". She says she is familiar with the "Municipal Development Plan".

4. During the last hearing on the former proposal for 26 Union Street before the Board she was sworn and gave unchallenged, her opinions.

5. Based on (1) - (4) supra she believes herself qualified to give an opinion on the present proposal as to its relative compliance with the intent of the Town's M.P.S.

Mrs. Cosman's formal education is as follows:

1. She is educated as a Registered Nurse in New Brunswick, (Saint John General Hospital);

2. She underwent post graduate training in Administration and Teaching at "Margaret Haigh" in Jersey City, New Jersey;

3. She has attained university credits in Business Administration, Political Science and Public Relations at the 300 and 400 level although she does not have a degree in those areas.

The Board holds the opinion that this type of background, although not a formal planning education, is a very good type of education taught in the very hard school of experience. Given the witness's elective functions, given her orientation to planning in the exercise of those functions, and given her focus on Bedford, the Board holds the opinion these experiences eminently qualifies this witness as entitled to give expert opinion evidence on planning matters as they affect the Town.

Mrs. Cosman expressed the opinion that the present proposal is bigger by 1/3 than the previous development proposed for 26 Union Street which had been previously turned down by both Council and the Board as being incompatible with the area on account of its excessive use, bulk and scale. Mrs. Cosman has difficulty understanding why the Town has changed its opinion on the development of 26 Union Street within 2 years of its rejection of a smaller proposal. She holds the opinion that the proposed building is not a use compatible to an area zoned R-1. Mrs. Cosman says the proposed use of 26 Union Street would be more appropriately placed in a commercially zoned area.

In processing this present application concerning 26 Union Street, Mrs. Cosman believes the Town has only done that which it was required to do as a matter of process under the Planning Act. As the Board understands this portion of her evidence, she has found no objection to the Town's "due process" in the handling of the development proposal for 26 Union Street.

The designation of the subject lands as "Commercial" on the future Land-Use plan portion of the Town's M.P.S. is not, in the opinion of Mrs. Cosman, a final determinate that the Council must grant any application to permit a commercial use of the subject land.

Mrs. Cosman gave the opinion that Council and Town staff had a positive duty to carry out their duties as specified in the M.P.S.

In the opinion of Mrs. Cosman the precursor of the present Planning Act used the phrase "interested person" as the qualifier to entitle a person to appeal a planning matter before the Board and that test should still be the test to be a qualified Appellant before the Board. She feels that "aggrieved person" should be given a much wider meaning than is now given by the Board in interpreting the Planning Act. She is of the opinion that an association such as the Appellant corporation could become an "aggrieved person" within the context of the Planning Act insofar as it is directly affected by the ramifications of the decision to change the land use within its residential neighbourhood.

Mrs. Cosman expresed her opinion that the positive vote of the "Resident's Association" conferred on the Appellant a right to proceed in this appeal on behalf of the individual residents. On further reflection, she stated that her previous answer trespassed on a legal question that she was not sure that she was qualified to answer.

Mrs. Cosman advanced her opinion that the proposed contract development directly affected the area as defined by the Memorandum of Association of the Appellant corporation. On being informed of Council's decision she would therefore expect the Appellant corporation to hold a meeting and to decide whether the effect of the Council's decision was positive or negative in respect to the area and then to act "accordingly." If it viewed the decision as harmful to its area then it would have to appeal to wherever possible. To her "it appeared" to be acting on behalf of its members in initiating this appeal.

Mrs. Cosman believes the Apellant corporation has a right to act on behalf of its individual members.

Mrs. Cosman doesn't believe that the decision of Council meets the intent of the M.P.S. because in her opinion:

1) the use of a contract development agreement as a vehicle to impose a commercial proposal into a R-1 zone is forbidden by the intent of the M.P.S.

2) She "doesn't agree with the decision of the Council."

In her opinion the statutory 5-year review of the M.P.S. is overdue in the Town in order to correct what she regards as "grey areas" in the relevant portions of the M.P.S.

The Appellant corporation then called Gordon Burris, 56 Union Street, Bedford, real estate agent and solicitor. Mr. Burris believes the current project authorized by the appealed development agreement will have a negative effect on the value of his property at 56 Union Street. He did not appeal the development agreement decision himself because he believed that the "resident's association" could do it for him. He has 9 years experience as a real estate agent. Mr. Burris is a recent member of the Appellant corporation having joined it the same evening he was appearing as a witness before the Board. Mr. Burris agreed that the existing buildings on 26 Union Street detract from real estate values in the neighbourhood.

Mr. Bill Richards, 80 Union Street, Bedford, gave evidence similar in essential content to that of Mr. Burris, except that Mr. Richards had attended the meeting of the Appellant corporation authorizing this appeal. The minutes of that meeting showed him at that time as preferring the present proposal for 26 Union Street to the previous one that had been turned down. Messrs. Douglas A. Tigewell, Donald Isnor, and Kenneth Smith residents of the area served by the Appellant corporation testified in the same vein, without the reference to the minutes of the meeting.

Margaret Chapman, 61 Union Street, is Vice-Chairman of the Appellant corporation. She believes that if the present proposed development succeeded "it would be completely demoralizing" to the association. Members would be totally frustrated with the Association and abandon it. That abandonment would result in the effectual destruction of the Association.

Mr. Innes, for the Applicant, called Albert Joseph Boudreau, former resident of Meadowview Drive. He said he was a former member of the Appellant corporation. Approximately one month ago, Mr. Boudreau sold his home on Meadowview Drive and moved elsewhere in Bedford and thus became ineligible to continue to be a member of the Appellant corporation. His house sold in one weekend at his asking price with which he was satisfied. The person who bought the house was transfered out-of-province on the day he closed the house sale.

Mr. Boudreau says he became dissatisfied with the Appellant's position on the 26 Union Street proposed contract development. He agreed that the Appellant corporation, at all of its meetings which he attended, had its meetings conducted by correct parliamentary procedures.

The Board will quickly deal with the Appellant's ingenious argument that the Appellant corporation suffered an injury or wrong from the decision of Council along the lines as set out in the evidence of Dr. Christiansen-Ruffman.

Accepting there would be an injury as explained by Dr. Christiansen-Ruffman, that injury would have resulted from some other source than the decision of Council. The injury could be said to result from the decision of the Legislature in the 1983 Planning Act to change the qualification to appeal a decision of a council approving the entering into of a development agreement from an "interested person" to an "aggrieved person". Perhaps the injury would result from the action of this Board, when interpreting the Planning Act on the facts before it, were it to find the Appellant corporation not to be an "aggrieved person". Perhaps the injury [deprivation of an actual or perceived ability to prosecute a planning appeal] resulted from some action or inaction of the Appellant corporation itself or of its individual members in not acting to perserve any right(s) of appeal that might have accrued to all or any of them within the existing law. The evidence indicates that the Appellant association "represented" its members before the Council and was able to advance fully its positions there without any restraint. The members may be dissatisfied with the result of that "representation" but the views were heard. Dr. Christiansen-Ruffman's theory of injury is built on the premise of the association being unable to be heard "representing" its members on the merits of their planning positions. No such bar to the expression of the Appellant corporation expressing its members' opinions existed at the hearing before Council.

As was stated, even accepting Dr. Christiansen-Ruffman's theory in the best possible light, Council's decision caused no injury recognizable by the Board capable of giving the Appellant corporation directly, in its own right, status as an "aggrieved person" which would make the Appellant corporation herein an Appellant qualified to have the Board take jurisdiction to determine this appeal on its planning merits.

Counsel for the Applicant raised a number of other complex arguments to persuade the Board to decide the Appellant corporation is not an "aggrieved person". The Board has not dealt with them. The Board's reluctance to deal with these other arguments should not be taken to mean that the Board disagrees [or agrees] with these arguments. The Board merely finds that it can decide the issues raised without resolving these other arguments.

Enough evidence on planning matters was adduced to satisfy the Board that it understood the nature and scope of the proposed development at 26 Union Street, that one or more of the inhabitants of the area who testified before the Board were persons aggrieved by the decision of Council complained of who at one time would probably have had a right to appeal that decision in their own right, and that the increase in size of this present project over the previously rejected project gave rise to an arguable case on the planning merits.

Was the Appellant corporation then acting throughout (and especially at the time of the filing of its appeal with the Board) as agent for those of its members who, at least by the time of the hearing, expected it to represent them? The Notice of Appeal expressed on its face no such agency. The Board has no powers in equity to allow amendment to any notice of appeal before it. Under the Board's Rules, the Board must deal with notices of appeal having regard, at least, to the following rules:

> "3. The Notice of Appeal shall be signed by the person who makes the appeal or by his solicitor or by his agent lawfully authorized.
>
> 6. (1) Upon receipt of a Notice of Appeal, the Board or some person appointed by it for this purpose shall examine the Notice of Appeal to determine whether or not it complies with the act and these Rules.
>
> (2) If the Board ... is not satisfied that the Notice of Appeal complies ... the Board shall give notice to that effect to the Appellant and may give the Appellant an opportunity to amend the Notice of Appeal within a time limited by the Board.

As set out near the beginning of this decision the Board made the appropriate findings concerning the Notice of Appeal through its Chairman and, having done so, exhausted all its powers to amend the Notice of Appeal herein. For these reasons alone the Board dismisses the present motion to amend the Notice of Appeal herein made in the Appellant's post hearing memorandum. In so deciding the Board leaves for another day and another hearing its opinion concerning the other objections made by the counsel for the Applicant to this motion to amend the Notice of Appeal herein and makes no finding one way or another concerning the validity of these other objections.

The Board has set out in some detail, supra, the evidence given by the witnesses for the Appellant corporation. The Board accepts Mr. Vernon Banks' view of what occurred at the meeting of the Appellant corporation authorizing this present appeal. The summary of that portion of his evidence relevant to the issue of agency bears repeating here:

> "Mr. Banks attended the meeting of the Appellant corporation at which the Appellant corporation decided to initiate this appeal. He didn't know if the Appellant corporation was to be representative of any particular properties and property owners in the appeal but he didn't think there was any such specification made or discussed at the meeting." [emphasis by the Board].

The summary of evidence of Shirley Towill, supra, tends to corroborate the evidence of Mr. Banks that no discussion of agency was taken at the Appellant's authhorization meeting. "When she first understood that the Appellant corporation would first have to qualify as an aggrieved person ...".

The Board holds the opinion that there is no credible evidence before it contradicting the evidence of Mr. Banks on the subject of the Appellant's appeal authorization meeting. To the extent that any of the evidence given by other witnesses could be seen as differing from his testimony, and thus possibly conflicting therewith, the Board prefers the evidence given by Mr. Banks.

The evidence taken as a whole indicates that no member of the Association who gave evidence before the

Board properly understood the real possibility that the Appellant corporation's appeal would not be heard on its planning merits because of the Appellant's inability to qualify itself as an "aggrieved person" at any time before the time had expired for filing appeals herein. Thus no person who so testified would, at any time related to the filing of the Notice of Appeal (or, at the latest, by the time had expired for filing appeals herein), would have formed the intent to appoint the Appellant corporation as his agent to prosecute this appeal. The membership did not make a blanket agency appointment [even if such an agency is legally possible in this matter] at its general meeting and no timely agency appointments were individually made by any of the members of the Appellant corporation who testified before the Board or of whom the Board has any knowledge.

The Board having reviewed all the evidence and listened to all the arguments finds that the evidence supports no finding of an agency (even if the Appellant corporation has the corporate capacity to act as an agent in the manner suggested by the representative of the Appellant corporation) sufficient to authorize the solemn initiation and carrying on of an appeal.

On the same review of the evidence, and begging the question of whether such an assignment is possible, the Board can find no actual assignment of the "chose in action" being the latent right of appeal of some "aggrieved person" member sufficient to make the Appellant corporation the actual owner of that "chose in action" and thus a possible "aggrieved person" in its own right.

The Board adopts an approach in interpreting its governing legislation which attempts to ensure that it hears all the appeals before it on their merits if legally possible.

The Board has made no findings, pro or con, as to whether a corporation such as the Appellant may qualify as an "aggrieved person" either as an agent of aggrieved persons or as owners of the rights to appeal assigned to it by aggrieved persons. In this decision the Board has merely said, if such delegation were possible or if such assignment were possible, the evidence tendered in this appeal supports neither the agency alleged nor any assignment of appeal rights from others.

Strain as it might, the Board in this appeal can find on the evidence before it no basis for finding the Appellant corporation to be an "aggrieved person" within the meaning of s. 71(1)(a) of the Planning Act. The Board therefore has no jurisdiction to hear this appeal on its merits and must dismiss the appeal for want of jurisdiction in the Board to hear the appeal.

An Order to dismiss this appeal pursuant to Section

29 of the Municipal Board Act will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 18th day of December, A.D., 1986.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD

Lynk v. County of Cape Breton

PLANNING--ZONING AMENDMENT--REFUSAL TO REZONE FROM R-1 TO C-2--WHETHER INCONSISTENT WITH OR UNNECESSARY FOR PROTECTION OF BEST INTERESTS OF MUNICIPALITY--WHETHER UNDUE HARDSHIP OR EXTRAORDINARY AND COMPELLING CIRCUMSTANCES--MUNICIPAL BOARD ACT, S. 27(4)--PLANNING ACT, SS. 63(1)(b),(6),(7), 83(1), 85, 86(2), 112

This is an appeal from a decision of the Council of the Municipality of the County of Cape Breton refusing to rezone the subject property from Residential (R-1) to Commercial (C-2). The property has 300 feet of street frontage and is 100 feet in depth. It is located about 200 feet from a provincial trunk highway and is adjacent to a large residential subdivision. The Appellant resided on the property and conducted a second-hand furniture business there. A lawyer was permitted to participate in the proceedings before the Board as a representative of certain concerned citizens in the subdivision. The subject property is situate in a district that does not have a Municipal Planning Strategy (MPS).

HELD: The Board confirms the decision of Council and dismisses the appeal.

There being no MPS in effect for the district, the Board is governed by s. 63(6) of the Planning Act, which states that "the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality." The Board must also consider s. 63(7) relating to undue hardship or extraordinary and compelling circumstances. The issues in this case are thus two-fold: (1) Is the Council's decision "inconsistent or unnecessary for the protection of the best interests of the Municipality"? and (2) Did the Appellant as the Applicant to have his property rezoned suffer "undue hardship" or are "extraordinary and compelling circumstances" present? Council's decision is not inconsistent with or unnecessary for the protection of the best interests of the Municipality. The predominant land-use in the vicinity is residential in character and this predominant use is reflected in the existing zoning for the area (R-1). The Appellant's business use is probably a non-conforming one and is not compatible with the residential use in the adjacent subdivision. It would not constitute good planning to rezone to C-2 simply because it would open up the possibility of the Appellant or his successor in title using the property for allowable uses under the C-2 Zone that are less compatible with the neighbourhood residential uses. If it does not constitute good planning then it is not in the best interests of the Municipality. On the second question, it cannot reasonably be said that by virtue of the Council's decision the Appellant would suffer undue hardship or that extraordinary and compelling circumstances are present. There is no evidence of any hardship let alone "undue" that is, "excessive" hardship. The Appellant is free to carry on his existing non-conforming business and may be able to apply for a development agreement if and when an MPS is adopted.

NSMB-535-86-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by **DONALD LYNK** from the decision of the Council of the Municipality of the County of Cape Breton made June 17, 1986, refusing the Appellant's application to rezone property at 21 Duffell Drive from Residential (R-1) Zone to Commercial (C-2) Zone.

BEFORE: R.H. BLOIS, Q.C., Chairman.

COUNSEL: ELIZABETH C. WALSH, LL.B., for the Appellant;

DAVID MUISE, LL.B., for the Municipality of the County of Cape Breton;

LEO A. MacPHEE, LL.B., on behalf of certain concerned citizens in the Charlestown Subdivision.

DECISION

This is an appeal pursuant to Section 63(1)(b) of the Planning Act, S.N.S., 1983, Chapter 9, by **DONALD LYNK** of 21 Duffell Drive in the Municipality of the County of Cape Breton (hereinafter called the Municipality) from the decision of the Council of the Municipality made June 17, 1986, refusing the Appellant's application to amend the Municipality's Land-Use By-law by rezoning the Appellant's property known as No. 21 Duffell Drive located approximately

200' from Provincial Trunk Highway No. 22 (known as the Mira Road), from Residential (R-1) Zone to Commercial (C-2) Zone. The subject property has a frontage on Duffel Drive of 300' and is 100' in depth. It is adjacent to a large residential subdivision known as the Charlestown Subdivision.

The Appellant's Notice of Appeal is dated July 7, 1986, and was filed with the Board on July 8, 1986. The grounds of appeal stated in the Notice of Appeal are:

> "1. The decision appealed from is not within the best interests of the Municipality;
>
> 2. In the alternative, the decision of Council ignores the commercial character of a portion of the neighbourhood and is therefore perverse".

At the commencement of the hearing which took place on November 13, 1986 in the Council Chambers of the Municipality, Mr. Muise, Counsel for the Municipality, made no objections to the Board's jurisdiction to hear the appeal on the merits.

Counsel for the Appellant having filed her Affidavit of Service of the Notice of Hearing in compliance with the Board's letter of instructions and the Board being satisfied that the Clerk of the Board had arranged for the Notice of Hearing to be advertised by three insertions in the Cape Breton Post on October 23, 1986, October 30, 1986, and November 6, 1986, proceeded to hear the appeal.

Mr. Leo A. MacPhee, Barrister, who appeared at the hearing on behalf of certain "concerned" citizens of the Charlestown Subdivision applied to the Board for status to participate in the proceedings pursuant to Section 27(4) of the Municipal Board Act, 1981 S.N.S. Chapter 9. Section 27(4) states that "The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceedings to participate in the hearing."

Mr. MacPhee filed as Exhibit L-4 a booklet containing the following:

1. The Affidavit of Anthony G. MacCormick, a resident of the Charlestown Subdivision which adjoins the property owned by the Appellant. This Affidavit sworn to on November 12, 1986, refers to two meetings of citizens in the Charlestown Subdivision held on June 5, 1986, and September 15, 1986, when resolutions were passed opposing the Appellant's application to have his property rezoned from R-1 to C-2 and opposing the appeal by the Appellant to the Board. Mr. MacCormick's Affidavit states that he believes that he has a real and substantial interest in the appeal "both personally and in my representative capacity of other concerned citizens because of the following factors:

"(a) The zoning question affects the only entrance and exit to the Charlestown Subdivision;

(b) All property owners in the Subdivision will be affected by the character of the area that composes the only entrance and exit to the Subdivision;

(c) The change in zoning will adversely affect property values in the Subdivision;

> (d) The zoning change may open the area involved to more generalized commercial development permitted under a C-2 classification, which development could be detrimental to the characterization of the Charlestown Subdivision."

2. The Affidavit of Leo A. MacPhee sworn to on November 12, 1986, to which is attached two snap-shots of the Appellant's property taken on November 10, 1986.

3. A brief signed by Mr. MacPhee on behalf of concerned citizens of the Charlestown Subdivision alleging certain facts relating to the Appellant's property and raising three issues for the Board's determination, namely:

> "1. May certain residents of the Charlestown Subdivision be allowed to participate in the appeal hearing through their counsel, pursuant to the Municipal Board act, 1981, C. 9, s. 27(4).
>
> 2. Is the decision of the Municipality of the County of Cape Breton, inconsistent with or unnecessary for the protection for the best interests of the Municipality; and
>
> 3. Will the Applicant suffer undue hardship or are there extraordinary and compelling circumstances present in this appeal necessary to allow the Board to overturn the decision of Council."

The Board ruled that it would permit Mr. MacPhee to "participate" in the proceedings pursuant to Section 27(4) of the Municipal Board Act as a representative of citizens in the Charlestown Subdivision. No objection to the Board's ruling was raised by Counsel for the Appellant.

The subject property is situate in District No. 17 in the Municipality which does not have a Municipal

Planning Strategy (M.P.S.). The zoning by-law in force in the Municipality by virtue of Section 112(1) of the Planning Act was filed as Exhibit L-5. A copy of the Order of the Minister of Municipal Affairs dated November 29, 1985, stating that the Municipality's Zoning By-law (excepting the area of polling district 10) "shall continue in force until the 1st day of December 1986 or until such earlier date that a Municipal Planning Strategy and Land-use By-law for the Municipality of the County of Cape Breton comes into force under the Planning Act" was filed as Exhibit L-6.

There being no M.P.S. in effect for District No. 17 the Board is governed by the provisions of Section 63 s.s.(6) of the Planning Act which states that:

> "Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

The Board must also consider the restriction imposed on it by s.s. (7) of Section 63 which states that:

> "Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

Subsection (5) of Section 63 does not apply to this case since there is no M.P.S. in effect. Subsection

(5) states that:

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The issues for the Board's determination in this case are two-fold:

(1) Is the Council's decision "inconsistent or unnecessary for the protection of the best interests of the Municipality"? and

(2) Did the Appellant as the Applicant to have his property rezoned suffer "undue hardship" or are "extraordinary and compelling circumstances" present?

Evidence was given on behalf of the Appellant by the Appellant, Donald Lynk and by the Appellant's son Paul Lynk. Evidence on behalf of concerned citizens of the Charlestown Subdivision was given by Anthony MacCormick, John Stubbert and James Jeffers, residents of the Charlestown Subdivision. Planning evidence was given by Kenneth L. Smith, a planner employed by the Cape Breton Metro Planning Commission who was called by the Municipality.

The Appellant testified first. He is the owner of property where he resides known as No. 21 Duffell Drive located in the Municipality in the Charlestown Subdivision. He owns two parcels of land, the first parcel having been purchased in 1945 and the second in 1954. There are three buildings located on the Appellant's lands. Firstly his two-storey dwelling house where he and his wife reside.

Secondly, an attached one-storey building used to store second-hand furniture. Thirdly, a two car garage.

The Appellant has operated a used furniture business from the subject site since the 1950's and this business has been his sole occupation since 1979. His dwelling was constructed in 1947 and the two-car garage in 1980. His son, Paul Lynk, age 25 years, is employed by the Appellant on a full time basis in the used furniture business and the Appellant also employs a part-time helper. The Appellant's original busiess involved the purchase and sale of coal stoves and furnaces but in recent years his business involves the purchase and sale of used furniture and household appliances.

Mr. Lynk pointed out that he had been doing business at the subject site before the Charlestown Subdivision was developed. He said there had been a slaughterhouse located behind his property which had operated for many years but had ceased to operate about 5 - 6 years ago. He said he had commenced renovations on November 10, 1986, to his garage building. He was seeking to rezone his property so as to expand his capacity to store used furniture. He stated that his dwelling house was situate between his garage and the Charlestown Subdivision. He said that he must enlarge his building as he requires more storage space as he is obliged to buy more furniture in bulk because of the high costs of operation. He emphasized that he does not have a pension plan for himself and his son's only job is as his employee. He had applied to the Municipality in 1976 to have his property rezoned but his application was refused.

Mr. Lynk was asked on direct examination if he had ever received any complaints about his business. He replied that in 1980 when he was building his garage he had received an anonymous letter. He stated that about 75% of the residents of the Charlestown Subdivision buy from his shop. He explained that his business does not just cater to local needs. He sells to the social services departments of the various Cape Breton Municipalities. He is presently in the process of purchasing a large vacant parcel of land situate on Duffell Drive between his property and the Mira Road. This property is zoned for residential use.

Mr. Lynk stated that his dwelling house was not used for his business other than he has a wash room in it which is used by his customers. He also maintains an office in his home. He stated that his double garage was built for use as a garage plus some storage space but it was built to dwelling house specifications so that it could be converted into a small house if times got tough. He stated that he was unable to do any heavy lifting and if he was permitted to expand his business he would have to expand his staff. He said at the time of his 1976 application for rezoning there were petitions supporting his application and opposing it.

On cross-examination by Mr. MacPhee, Mr. Lynk was shown a copy of a 1980 application (Exhibit L-9) by Mr. Lynk, for a building permit to erect a 26' x 36' "double car garage for residential use only at No. 21 Duffel Drive". He was also shown a copy of a building and development permit (Exhibit L-10) issued to him on April 9, 1986, to carry out "roofing repair" to an existing non conforming commercial building located at 21 Duffel Drive. Mr. Lynk admitted that in carrying out his roof repairs for his used furniture building he had enclosed a roof overhang at the front of the building. This permit did not authorize Mr. Lynk to enclose the overhang portion of the building. Mr. Lynk stated that he had received permission to do this after the repair work had commenced. Mr. Lynk was referred to a copy of a letter from the Building Inspector to him dated September 5, 1986, stating in part that "It has come to my attention that the repairs underway on Duffel Drive, C.B. do not meet the above permit application". Therefore, ..., "the said permit (A-1581) is hereby cancelled and all work on the building must cease immediately." Also on cross-examination by Mr. MacPhee, Mr. Lynk admitted that he had used his garage for the storage of inventory.

On cross-examination of the Appellant by Mr. Muise it was brought out that the Appellant's hours of business are "all day". The Appellant admitted that on occasion he has done repairs to his furniture stock outside his building and that for short periods of time his inventory is stored outside. He also admitted working on Sundays.

He stated that he had no intention of getting into the bicycle repair business if his property were rezoned although he admitted that his son had taken a course in this field of endeavour.

Paul Lynk, the Appellant's son was the next person to testify. He said he has been working for his father since February of 1986 and someday hopes to take over the business. He stated that he has no intention of going into the bicycle repair business. He justified the enclosure of the overhang by stating that if it were not enclosed the overhang portion of the roof would have been removed by the wind. He admitted that some inventory was stored outside for short periods after it was unloaded from trucks. He stated that the present business building did not have a repair facility and there was no place to store tools.

James Jeffers the owner of property at 4 Paul Street in the Charlestown Subdivision (about a block from the Appellant's property) where he resides testified on behalf of the Appellant. He has lived in this subidivision for 20 years. There were 12 - 15 homes in the subdivision when he purchased his property. He has a son who works part time for the Appellant. He stated that if the Appellant's business was allowed to expand it wouldn't bother him.

Anthony MacCormick, the owner of property located at 129 Patrick Avenue in the Charlestown Subdivision was called by Mr. MacPhee. He has resided in his property since 1968. He was asked what buildings were located on the Appellant's lands in 1968. He replied that he could only recollect the Appellant's dwelling house at that time. He didn't think the other two buildings were there then. He identified Exhibit L-12) as a copy of a Petition signed by concerned citizens of the Charlestown Subdivision in 1977 who were opposed to the commercial rezoning of any property on Duffel Drive in 1977. Mr. MacCormick stated that the Appellant has stored furniture in his garage ever since it was built.

Mr. MacCormick referred to a copy of a Petition presented to the Council in June of 1986, signed by over 100 residents of the Charlestown Subdivision who are opposed to the rezoning of the Appellant's property. This petition appears on pages 17 - 25 inclusive of Exhibit L-7. He said he was opposed to the proposed rezoning because the Appellant's property was on a road which provides the only entrance and exit to the Charlestown Subdivision (except for an emergency exit) and he was concerned about other allowable commercial uses for the property if the rezoning was approved. He also expressed concern that if the rezoning were approved it would be a precedent for further rezoning applications. He said he had little difficulty with the Appellant's present use of his property but was concerned about the possibility of other commercial uses being established for the property.

On examination by the Board, Mr. MacCormick stated that he could live with the Appellant's present operation but not with any expansion of the business. He said he drives by the Appellant's property on a daily basis and said it is not unusual to see some used furniture, fridges or stoves to be left outside for periods of one week. He said that the concerned citizens of the Charlestown Subdivision constitute an unincorporated association.

John Stubbert of 120 Patrick Avenue in the Charlestown Subdivision was also called by Mr. MacPhee. He owns his home which was built in 1969. He expressed the opinion that if the Appellant's property is rezoned and he wanted to sell his property he would not be able to realize his present fair market value. He said that the doors of the garage on the Appellant's property are open most of the time and one can see used furniture stored there. He thought there might be a safety hazzard for small children because of fridges that are stored on the property. He was opposed to the rezoning of the subject property because he thought it was unsightly and a hazzard. He also expressed concern because of the possibility there would be an increase in traffic.

Mr. Stubbert stated that he wishes to maintain the residential character of his area and is therefore opposed to the rezoning of the subject property to C-2 Zone.

Expert planning evidence was given by Kenneth L. Smith, a planner employed by the Cape Breton Metro Planning Commission. Mr. Smith prepared a planning report dated

May 5, 1986, which had been submitted to the Council of the Municipality. A copy of this report is contained on pages 2, 3, and 4 of Exhibit L-7. Mr. Smith's report recommended the rejection of Mr. Lynk's application. It also recommended that "the application be considered for a development agreement when District 17 starts its own Municipal Planning Strategy process".

Mr. Smith's report states that Mr. Lynk's used furniture and appliance sales and repair shop is an existing non-conforming use.

The following "comments" appear in Mr. Smith's report, viz:

> "At present, the existing business is certainly in need of repairs. If granted a rezoning for the existing site, Mr. Lynk would have an opportunity to refurbish the existing building. This would enable the applicant to increase the size of the building and therefore provide better storage facilities and an adequate repair shop. It could also improve the appearance of the property and may have less of an impact on the adjacent subdivision in general. However, the problem is the existing Land Use By-law does not enable Council to place restrictions on the size of the operation or any limitations which would lessen the impact on the neighbouring properties e.g. screening, outdoor storage, hours of operation, etc.
>
> The same is true if Council rezoned the lot closest to the Mira Road Highway on LRIS Lot No. 15214182 or the entire 30,000 sq. feet. The only advantage to moving the entire operation to the front lot would be the absence of any abutting residential development. The operation would also be located approximately 120 feet further away from the present subdivision. However, it is the opinion of the Planning Commission staff that a used furniture and appliance shop is not ideally suitable in an area so close to a major subdivision, especially if the operation was allowed to develop on the entire 30,000 sq. ft. We can see the merits

> in allowing some reasonable expansion to the existing operation only; unfortunately, rezoning the property could present new problems. In a situation such as this, the use of a development agreement would be extremely useful. As stated before, the existing Land use By-law does not enable Council to do this."

Mr. Smith testified that in his opinion as a planner the decision made by the Council in rejecting the Appellant's application for rezoning was in the best interests of the Municipality. Mr. Smith, as is noted, in his report felt that there were some "merits" in the Municipality allowing the Appellant some "reasonable expansion" to his existing operation. He was of the opinion that if the Municipality had a Municipal Planning Strategy in place for District 17 which authorized the Council to enter into development agreements he would be prepared to recommend the consideration of a development agreement which would allow for a minor expansion of the Appellant's business facilities on a limited portion of his property. This process would permit the Appellant to create more storage space and repair facilities. This in turn might eliminate the need to store goods outdoors.

The Board viewed the subject site and the Charlestown Subdivision on November 13, 1986, the date the appeal was heard.

Post-hearing submissions were filed with the Board by Counsel for the Appellant on November 27, 1986, by Counsel for the Municipality on December 1, 1986. Counsel for the citizens of the Charlestown Subdivision advised the Board by a letter received December 4, 1986, that he will be "relying on my submissions in the pre-hearing brief". He also advised the Board that he concurs with the submissions made in the post-hearing brief filed by Counsel for the Municipality.

In his pre-hearing brief Counsel for the concerned citizens of the Charlestown Subdivision referred to Section 63 s.s.(6) of the Planning Act which states that:

> "63(6) Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

He then refers to a decision of the Board in the case of MacDonald v Town of Westville (Vol. 4B/1985 page 34) where the Board disallowed the appeal of an applicant for rezoning who had been refused by Council. The Board in the MacDonald case stated "that the decision of the Council was for the protection of the best interests of the Town since it protects the basically residential character of the neighbourhood in which the subject land is situate from the intrusion of an incompatible commercial use."

Counsel for the concerned citizens contends that in the subject case the decision of the Council "protects the residential character of the Charlestown Subdivision Area" as in the MacDonald case.

The post-hearing brief submitted by Counsel for the Appellant includes a careful analysis of the facts and the evidence adduced. She submits that the best interests of the Municipality would be served by allowing the proposed rezoning for the following reasons viz:

> "1. The economic considerations are relevant to the best interest test. It is submitted that if the existing business is unable to expand, it will not be able to support the minimum two full-time persons necessary to keep it in operation. If it does expand, it is anticipated that a third full-time job will be created.
>
> While that may seem insignificant in the vastness of the economic landscape, it is an unfortunate fact that three secure jobs in Cape Breton County are quite significant.
>
> Three secure jobs mean three secure families. They mean, to be specific, that Mr. Lynk will not have to seek social assistance from the Municipality. They mean that Mr. Paul Lynk will be able to maintain his home and start the family he wants, an independent unit, not reliant on social assistance and public housing. And, if Bobbie Jeffers obtains a full-time job, the security of another individual and potentially of another family will be realized.
>
> One can be more confident of the certainty of the foregoing unqualified statements in this case, than in a situation in which someone wishes to rezone a lot of land to construct a convenience store or pool hall, because in the former case one is predicting the future without proof of success. In the instant case, the Appellant has supplemented his income from the business since the early 1950's and he has made his sole livelihood from it since he became unemployed in 1979. Because of the Appellant's age and health and the changing economic times, the business is unable to survive without the expansion of facilities to enable Paul Lynk to work with his father.
>
> 2. Aside from the merit of securing permanent jobs, one other way which the Appellant's used furniture business benefits the Municipality was clearly pointed out during the hearing. The Appellant observed that the Social Services Department of the Municipality not infrequently calls upon his business to obtain furniture and appliances for its clients as do people

in the sub-division and members of the public at large.

3. From a land-use point of view the municipal planner who testified, stated that in weighing the need to protect the residential character of the neighbourhood, a commercial zone was to be avoided. However, it would appear that in arriving at his conclusion the planner failed to take into account some historic and geographic factors and failed to weigh the obvious factor that no Municipal Planning Strategy exists in the relevant municipal district.

It would appear that controlled expansion is within the best interests of the Municipality according to the evidence of the planner and yet if this appeal is not granted, the business must face collapse while awaiting a Municipal Planning Strategy. It is difficult to reconcile how two "best interests" can exist at the same time.

It is also an enigma that the protection of the residential area should take priority over other best interest concepts with the Appellant standing in the centre of the controversy saying that he is prepared of what is reasonably necessary to meet the concerns of most of his neighbours. One suspects that the Appellant could never satisfy a man like Mr. Stubbert, but could certainly keep Mr. MacCormick happy with a neat and orderly development of his property.

4. In determining what is in the best interests of the Municipality, it is submitted that one might look at the Appellant's demonstrated concern to preserve some aesthetic dignity and integrity on his premises.

The property is landscaped. The Appellant showed photographs taken ten years ago which indicated that the premises were then kept in a dignified condition. The Appellant spoke of the frustration under former zoning regulations of not being able to do repairs when he started to. The Appellant lives on the property and it is his intention to continue to reside on the property. The existing buildings are adequately maintained, certainly to the level of the out buildings in the adjoining Charlestown Sub-Division.

The plan submitted for the extension which the Appellant wishes to make to his garage are for an orderly development to the rear of the existing buildings and more screened from the sub-division than the existing development.

The evidence of Mr. MacCormick and Mr. Jeffers suggests that one need not fear the premises being unsightly and one might remember that the premises only grew to be in need of repair because the Appellant was unable, until recently, as a non-conforming use, to obtain the necessary permits to effect repairs.

Although it is apparent that goods may still be required to be outside for temporary periods, it will no longer be necessary to keep them outside on as frequent a basis as now. If the extension is built, there will be adequate storage space.

5. In determining what is in the best interest of the Municipality, it is submitted with respect that one must recall that legitimate mechanisms are in place to protect the Municipality and the surrounding residents, should the Appellant, for whatever reason, fail to live up to his commitment to minimize the impact of the commercial development and to restrict it to the used furniture and appliance business.

There mechanisms are as follows:

(a) If a nuisance involving noise or noxious fumes or other pollutants is created, the adjoiners may seek relief through an action in nuisance in the Supreme Court.

(b) If an unsightly mess is habitually present on the premises, the Municipality may prosecute under the unsightly premises By-Law.

(c) If building permit restrictions are not adhered to, prosecution may result and the premises may in fact be ordered levelled to the ground at the expense of the citizen.

(d) Finally, if plans surfaced for an alternate commercial use for the premises, the citizens and/or the Municipality may move immediately for a rezoning.

While none of these options is as attractive as the kind of contract which one might utilize under a Municipal Planning Strategy, it would

> appear that consideration was not given to them when the Municipality determined what was in its best interests.
>
> These options give credence to the Appellant's position that the decision of the Municipal Council to refuse rezoning was not necessary to preserve the best interest of the Municipality.
>
> 6. Finally, if one examines the alternative uses available under a C-2 zone, they may be more attractive to the neighbourhood than the slaughterhouse which only recently ceased operation or the sewage treatment plant which still exists in the sub-division. The uses include:
>
> business and professional offices;
> commercial recreational establishments;
> retail stores;
> restaurants.
>
> The present zoning permits cemeteries, nurseries, hospitals and schools."

Counsel for the Appellant submits that the MacDonald v Town of Westville case relied upon by the intervenors is not relevant as the Appellant in that case was not the operator of a non-conforming use of his property as is the case under appeal but had only recently utilized his property in a manner contrary to the Town's land-use by-law.

Counsel for the Appellant correctly points out in her brief that:

> " The Board has the right under Section 63(7) to allow an appeal whether or not the decision of Council is inconsistent with or unnecessary for the protection of the best interest of the Municipality."

She states that:

> " If the appeal is unsuccessful on its merits as those are narrowly defined in Section 63(6), it is respectfully submitted that this is an appropriate case for the exercise of the Board's discretion under Section 63(7)."

This appeal having been brought pursuant to Section 63(1)(b) of the Planning Act by the Appellant as an unsuccessful applicant to the Council to have the Municipality amend its Land-use By-law by rezoning the Appellant's property from R-1 to C-2 zone, the Board is restricted from interfering with the Council's decision by virtue of the provisions of Section 63, s.s.(6) which state that:

> "Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the Municipality."

After a careful review of the evidence and a study of the briefs filed by Counsel and having viewed the subject site and the Charlestown Subdivision, the Board is of the opinion that the Council's decision was not inconsistent with or unnecessary for the protection of the best interests of the Municipality.

The evidence indicates that the Appellant is probably carrying on business by virtue of a non-conforming use of a portion of his property although a finding to this effect is not required for purposes of this appeal. In the Board's opinion the predominant land-use in the vicinity of the subject property is residential in character and this predominant use is reflected in the existing zoning for the area which is R-1. It is also the Board's opinion that the existing business use of a portion of the Appellant's property is not compatible with the residential use of property in the adjoining Charlestown Subdivision. The Appellant, if he has established a non-conforming use of his property, is afforded some statutory protection under the provisions of the Planning Act. Section 83(1) of the Planning Act provides that ".... a non-conforming use of land or a structure, ... may continue to exist." Sections 85 and 86 of the Planning Act place certain restrictions on the continuation of a non-conforming use. Under Section 86(2) of the Planning Act a non-conforming use of land or a structure "shall not be recommenced if it has been discontinued for a continuous period of six months, and in such an event, the land or structure shall not thereafter be used except in conformity with the requirements of the land-use by-law applicable to the property."

The Board is of the opinion that it would not constitute good planning to rezone the Appellant's property to C-2 simply because it would open up the possibility of the Appellant or his successor in title using the subject property for allowable uses under the C-2 Zone which are less compatible with the neighbourhood residential uses. The C-2 Zone allows "all uses permitted in the R-2 Zone, subject to R-2 requirements, business and professional offices, commercial recreational establishments, retail stores, restaurants." It follows that if it does not constitute good planning, then it is not in the best interests of the Municipality.

On the matter of what constitutes the best interests of the Municipality, the Board adopts the following statement from Page 31 of Vol. 1 of the P.P.A.B. Reports respecting the decision of the Provincial Planning Appeal Board in the appeal by the Lord Nelson Hotel, viz:

> " The Board agrees with the Appellant's submission that the phrase "the best interests of the municipality" is to be interpreted in the light of planning considerations and that the main guidance is to be obtained from professional qualified planners in various fields such as urban economics, urban design, city planning, etc.
>
> The Planning Act is designed to promote the orderly development of municipalities having regard to proper planning principles. The Board believes that if sound planning principles are followed the best interests of the municipality will be served."

In this case the Board agrees with the planner, Kenneth Smith who testified that the Council's decision is refusing to approve the Appellant's application was in the best interests of the Municipality.

It is one thing to have the Appellant's property continue in its operation as a legal non-conforming use which use is not compatible with the adjoining residential uses as this continued non-conforming use is protected by the Planning Act. It would, however be another thing to permit this incompatible non-conforming use to expand by rezoning the Appellant's entire property to C-2 Zone. The Council refused to approve the Appellant's request to rezone and the Board agrees with the Council. There is an onus on the Appellant to prove that the Council's decision is inconsistent with or unnecessary for the protection of the best interests of the Municipality and it has not done so.

Mr. Smith in his report, while recommending that the Appellant's application for rezoning be rejected, also recommended "the Application be considered for a development agreement when District No.17 starts its own Municipal Planning Strategy process." Mr. Smith did not elaborate on what precise form such a development agreement might take. It is premature for the Board to comment on whether or not a development agreement for the subject property would meet the intent of a M.P.S. which is not yet in existence. However, it is clearly an option which may be available to this Appellant if and when a M.P.S. for District No.17 comes into effect.

The Appellant's Solicitor submits in her brief that "if the appeal is unsuccessful on its merits as those are narrowly defined in Section 63(6) .... that this is an appropriate case for the exercise of the Board's discretion under Section 63(7)." With respect the Board disagrees with this submission. While the Appellant undoubtedly would be economically better off if the Council had rezoned his property as requested, it cannot reasonably be said that by virtue of the Council's decision the Appellant would suffer undue hardship or that extraordinary and compelling circumstances are present. There was no evidence before the Board which would lead the Board to the conclusion that if the Appellant's property is not rezoned to C-2 the Appellant would suffer any hardship let alone "undue" that is, "excessive" hardship. The Appellant is free to carry on his existing non-conforming business and if and when the Municipality adopts a M.P.S. for District No.17 and it is approved by the Minister of Municipal Affairs, the Appellant may have the opportunity to apply for a development agreement which conceivably could offer him some relief and at the same time provide some reasonable protection to the residential property owners in the adjoining Charlestown Subdivision.

The Board, for the reasons stated, confirms the decision of the Council and dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of December, 1986.

RHBlois

R.H. BLOIS
Chairman

Town of Port Hawkesbury v. County of Richmond

MUNICIPAL BOUNDARIES--APPLICATION TO ANNEX AREA OF COUNTY ADJOINING TOWN FOR INDUSTRIAL DEVELOPMENT--NECESSITY OR EXPEDIENCY--FINANCIAL FACTORS, BURDEN OF TAXATION--BEST INTERESTS OF INHABITANTS OF AREA, SOCIAL IMPLICATIONS--INTERPRETATION ACT, S. 22(3)--MUNICIPAL BOARD ACT, SS. 27, 29--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT (R.S.N.S. 1967), SS. 8, 18--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT (S.N.S. 1982), SS. 6, 22(1)

This is an application by the Town of Port Hawkesbury to annex a parcel of land in the Municipality of the County of Richmond containing about one hundred acres and located contiguous to the southern boundary of the Town. A preliminary issue is whether part of the land in question was within the County of Inverness, but the Board is satisfied from surveying evidence that it is not. The Town owned the land proposed to be annexed and intended to use it for industrial development.

HELD: The application is dismissed without costs to either party.

Since the filing of the present application a new Municipal Boundaries and Representation Act (S.N.S. 1982, c. 10) came into force. The new Act required additional factors to be considered. The Board must now take into account not only "the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers and all other relevant matters that in the opinion of the Board appear to be necessary or expedient," but also the factors now set out in s. 22(1): "The best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for." In the opinion of the Board, the Town has not proved that annexation of the subject lands is a necessity since there is a considerable number of vacant lots in the existing Light Industrial Park. As to the expediency of the annexation by the Town of the subject lands for future expansion of its Light Industrial Park, this likewise has not been established. To annex parcels of land which in total acreage almost equal the size of the Town's existing Light Industrial Park when there remains considerable vacant land in that park and when other sizeable parcels of vacant land exist within the Town's boundary, does not meet the test of "suitability to the circumstances or conditions of the case." That is not to say however, that the Town may not at another time establish that annexation is the most expedient way in which the Town can augment its stock of lands for industrial use. As to the burden of taxation if the application were granted, the Board is unable to estimate this because of uncertainty of funding for the development of the lands. In considering "the best interest of the inhabitants of the area," the Board assumes that the area to be considered is the area for which the annexation application has been made. This area is uninhabited. Also, the "social implications of the order applied for" is not relevant in an application to annex this uninhabited area.

Port Hawkesbury v. County of Richmond

Per Darryl W. Wilson (dissenting): The Board should grant an order for the annexation of the 100 acre parcel. In my opinion the expediency of the annexation, as required by s. 6 of the Municipal Boundaries and Representation Act, has been established by the Town. The site is contiguous to the southern boundary of the Town and the Town's Light Industrial Park. All agree the site is an excellent one for industrial development. Annexation to the Town would have almost no impact on the Municipality, which has no plans or need for the subject land. The evidence of the planner retained by the Municipality that 315 acres were available for industrial development in the Town is not quite accurate. In any event the subject site is the most suitable location for future industrial development in the Town and more suitable than those mentioned by the planner for the Municipality. At this site there will be no problems with land-use conflicts with adjacent property owners.

NSMB-12-85-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, S.N.S., 1982, Chapter 10;

- and -

IN THE MATTER OF: An Application by the Town of Port Hawkesbury to annex an area adjoining the southern boundary of the town and presently within the Municipality of the County of Richmond.

BEFORE: ELIZABETH SALTON, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member
RICHARD L. WELDON, Member

COUNSEL: LAWRENCE K. EVANS, LL.B., for the Town of Port Hawkesbury

ARTHUR W.D. PICKUP, LL.B. and MARY ELLEN ROSE, Articled Clerk, for the Municipality of the County of Richmond

DECISION

A hearing was held by the Board in the Council Chambers of the Municipality of the County of Richmond in Arichat on May 1, 2 and 15, 1985, on an application by the Town of Port Hawkesbury, dated February 1, 1985 and received by the Board February 4, 1985, to annex a parcel of land in the Municipality of the County of Richmond containing one hundred acres more or less, located contiguous to the southern boundary of the Town of Port Hawkesbury. The application was made pursuant to Section 18 of the Municipal Boundaries and Representation Act which states:

> "18(1) Upon an application to it, the Board may by order
>
> (a) amalgamate a municipality with any other municipality or municipalities;
>
> (b) annex the whole or any area or areas of a municipality to another municipality or municipalities.
>
> (2) Application under this Section may be made by
>
> (a) the Minister;
>
> (b) the council of a municipality; or
>
> (c) at least fifty ratepayers in the municipality or area sought to be amalgamated or annexed where there are more than one hundred ratepayers in the municipality or area or by a majority of the ratepayers in a municipality or an area where the total number of ratepayers in the municipality or area does not exceed one hundred.
>
> (3) An application shall contain a description of the municipality or area proposed to be amalgamated or annexed and of its boundaries."

The application of the Town of Port Hawkesbury filed as Exhibit P-1, states:

> "1. THAT the Town of Port Hawkesbury, herein called the "Town", is a body corporate under the provisions of the Towns Act.
>
> 2. THAT the Town hereby applies to have a revision of the Town boundary made to include as part of the Town certain lands described in Schedule "A" hereto annexed.
>
> 3. THAT a copy of the Resolution of the Petitioner authorizing the making of this application, certified by the Clerk of the Town of Port Hawkesbury to be a true copy of the Resolution is Schedule "B" hereto annexed.
>
> 4. THAT the lands described in Schedule "A" are presently located in the Municipality of the County of Richmond and are contiguous to the Southern boundary of the Town of Port Hawkesbury.

5. THAT all of the lands described in Schedule "A" are presently owned by the Town by virtue of Deeds recorded at the Registry of Deeds for the County of Richmond at Arichat, Nova Scotia in Book 96, Page 238 and Book 96, Page 455 respectively.

6. THAT the grounds of this application are as follows:

(a) That the lands described in Schedule "A" adjoin the existing Light Industrial Park of the Town of Port Hawkesbury;

(b) The Town wishes to expand the Light Industrial Park and the lands described in Schedule "A" are the most suitable for such an expansion;

(c) The lands described in Schedule "A" can be serviced with sewer and water by the Town and any streets which would be constructed would be an extension of existing streets in the Town;

(d) Since the lands described in Schedule "A" are vacant lands, the change of the Town boundary as applied for will not have any impact upon the financial status of the Municipality of the County of Richmond nor will it have an impact respecting the property tax base of the said County.

(e) The lands described in Schedule "A" are only accessible from the Town and can only be properly developed utilizing the sewer and water services and streets presently located in the Town.

7. THAT the Petitioner herein requests the privilege of presenting further evidence in favour of this application.

8. THAT the name and address of a person to whom documents or notices relating to this application are to be given or served is Colin J. MacDonald, Chief Administrative Officer, Provincial Building, P.O. Box 10, Port Hawkesbury, Nova Scotia, B0E 2V0.

WHEREFOR your Petitioner prays that the Board approve the proposed annexation to the Town of Port Hawkesbury of the lands described in Schedule "A" effective at such date as the Board may determine."

The application was sealed and signed by the Mayor, Almon J. Chisholm, and the Town Clerk, Colin J. MacDonald.

A preliminary issue raised by the Board concerned whether or not the lands sought to be annexed by the Town lay partially in the Municipality of the County of Inverness as well as in the Municipality of the County of Richmond, and if so, whether the Municipality of the County of Inverness had been or should have been notified as specified in Section 27 of the Municipal Board Act, S.N.S., 1981 Chapter 9, as follows:

> "27(1) Parties to any application, appeal or other matter or proceeding before the Board include
>
> (a) the applicant or appellant;
>
> (b) the person responsible for a decision or act that is appealed;
>
> (c) any municipality and any board, commission, committee or agency thereof that may be affected;
>
> (d) the Minister.
>
> 27(2) Parties shall be notified of the commencement of proceedings and of any hearing, and may appear and participate in the hearing."

This issue arose from a copy of a portion of the Crown Index Map showing the lands proposed to be annexed (Exhibit P-4) forwarded to the Board prior to the hearing at the Board's request. The letter which accompanied Exhibit P-4, written to the Clerk of the Board by Kelly Burke, secretary to Mr. Evans, Counsel for the Town, states:

> ".... The location of the Richmond County boundary line as outlined on this map is not an accurate representation. The County line was re-established several years ago as adjoining the boundary of the Town of Port Hawkesbury."

Exhibit P-4 shows the Municipality of the County of Inverness abutting the southern boundary of the Town and covering approximately one-third of the lands which are the subject of this annexation application, the balance lying in the Municipality of the County of Richmond.

At the Board's request, Counsel for the Town called Brian Arthur Anderson, a licensed surveyor residing in the Town who was familiar with a decision of the Board of the Commissioners of Public Utilities regarding the boundaries of the Municipality of the County of Richmond and the Municipality of the County of Inverness, and who filed a copy of the Order of that Board, dated December 8, 1972, as Exhibit P-2. That order established the boundary of the Municipality of the County of Richmond as contiguous with the southern Town boundary. Mr. Anderson stated that no portion of the Municipality of the County of Inverness lay south of the southern town boundary.

The Board, being satisfied that the Municipality of the County of Inverness was not a party to this hearing pursuant to Section 27 of the Municipal Board Act because it is not an abutting Municipal unit to the southern boundary of the Town or any part of the lands which are the subject of this annexation application, proceeded with the hearing.

Counsel for the Town filed an Affidavit (Exhibit P-5) dated April 30, 1985, confirming that Notice of Hearing had been served as prescribed in the Order of the Board of April 1, 1985. The parties agreed that all necessary preliminary matters had been properly attended to and the Board assumed jurisdiction to hear the application on its merits.

Counsel for the Town called four witnesses - the Executive Director of the Port Hawkesbury Industrial Commission, the

Chief Administrative Officer of the Town, the Mayor and the Director of Finance for the Town. Counsel for the Municipality called two witnesses - a Senior Planner with the firm of Underwood McLellan and the Chief Administrative Officer of the Municipality. The first two witnesses for the Town were recalled for rebuttal evidence.

Mr. George Beasley, Executive Director of the Port Hawkesbury Industrial Commission which is responsible for attracting industry to the Port Hawkesbury area and especially to the Industrial Park, and for managing the Industrial Park, gave evidence on the current status of the park and its proposed future development.

Mr. Beasley indicated the phased expansion of the Industrial Park on a plan prepared by the Town's Engineering Department dated June 1976 and entitled "Proposed Industrial Park Expansion". Of the 49 lots originally available in Phases 1 and 2 of the park, 3 lots are still available - Lots 5, 6 and 12. Of the 13 lots created in Phase 3 of the park which were initially offered for sale in February 1985, 2 have been sold, with the sale of 3 others still being negotiated. The only industrial lands controlled by the Industrial Commission are in the Industrial Park, Mr. Beasley stated.

A plan, dated November 19, 1981, prepared for the Industrial Commission by Beasy Nicoll Engineering Limited entitled "Alternative Sites" (Exhibit P-7) was explained by Mr. Beasley. Exhibit P-7 is a topographical map showing the Town and surrounding area including structures and street and highway layouts. It shows the existing Light Industrial Park together with 3 alternative locations. Alternative number 1 is land owned and used by Gulf Oil for bulk storage located inside the town boundary at the eastern end of Granville Street and adjacent to Ship Harbour. Alternative number 2 is land located adjacent to and on the north side of Phases 1 and 2 of the industrial park. Alternative number 3 is an area abutting the western boundary of the Town midway between the north town boundary and Highway 4.

Mr. Beasley commented on the feasibility of each of the alternative locations for light industrial uses shown on Exhibit P-7, noting that alternative number 2 was chosen for Phase 3 of the Light Industrial Park which was completed in 1984. Alternative number 1 on Exhibit P-7 lies adjacent to the town boundary to the southwest of the land proposed to be annexed in this application before the Board. It is owned by Gulf Oil Limited. Alternative number 3 is located adjacent to the proposed Nautical Institute site at the western edge of the Town. That area of town is not currently serviced. Mr. Beasley estimated that services would have to be extended 1500 feet to alternative location number 3, which he contrasted to the extension of 400 feet from the existing industrial park which would be needed to service the proposed 100 acre site which is the subject of this annexation application. Mr. Beasley indicated that the Town's Industrial Commission considered the land which was purchased by the Town and which the Town now wishes to annex to be preferable to either alternative location number 1 or number 3 for further expansion of the Town's Light Industrial Park.

The proposed development of the subject property of 100 acres was shown on a drawing by Strait Engineering Limited dated October 19, 1984 (Exhibit P-8) and detailed in a proposal entitled "Local Employment Assistance and Development Program, An Infrastructure Project for Expansion of the Port Hawkesbury Light Industrial Park", dated February 27, 1985 (Exhibit P-9). Mr. Beasley explained that the submission presented to the Regional Assessment Committee of Local Employment Assistance and Development Program (LEAD) anticipated that two of a potential four phases necessary to develop the 100 acres would be implemented initially at a cost of $923,000.00. The total cost for all four phases was estimated to be $2,100,000.00.

The LEAD application by the industrial commission was for a total amount of $700,000.00. At the same time, the commission made application to the Strait of Canso Industrial Development Authority (SCIDA) for the remaining funds, anticipating that half of the total $223,000.00 requested might be funded by SCIDA and 30% or $67,300.00 by the provincial Department of Development. The balance would be the responsibility of the Industrial Commission. In order to ensure that the LEAD application be considered however, the Town was required to commit itself to fund the amount of $223,000.00 which Mr. Beasley said had been done, on the condition that the annexation of the subject land was approved.

Lot sizes for the proposed 50 acre development had not yet been determined Mr. Beasley said but would probably be larger than the existing lot sizes. The largest lot currently available in the existing industrial park is 2.1 acres.

Mr. Beasley stated that the Industrial Commission had a sufficient supply of small lots to last a year but no larger lots. He believed that there were no large parcels of privately owned land available for industrial use in the town although there were some parcels "downtown" which could be available for commercial use.

When the Industrial Commission first put its lots on the market in 1968, there were no covenants in the deeds requiring development on the land. Now Mr. Beasley said development is required within a period of 2 years of purchase or the Industrial Commission may buy back the lot at its original price.

In cross-examination, Mr. Beasley agreed that if alternative site number 3 were serviced for the proposed Nautical Institute it could be useful as well for certain industries although he thought it would more likely be developed for other institutional uses. He acknowledged that the existing industrial park contained a mixture of service industries and commercial development but explained that the Industrial Commission had a two-tier price structure to encourage industrial uses in the park. The commission charged $22,500.00 per acre for a commercial use and $15,700.00 per acre to an industrial purchaser. Mr. Beasley stated that the Port Hawkesbury Industrial Park land prices were the third highest in the province. Mr. Beasley said that the development costs for Phase 3 of the industrial park had been $23,000.00 per acre and that the sales price has not yet been established. In response to the question of whether or not there were ample other areas in town suitably zoned and available for light industrial use Mr. Beasley responded that there were, in some cases.

Mr. Beasley was asked to comment on some of the policies in the Town's Municipal Development Plan (Municipal Planning Strategy) relating to industrial development. The Municipal Planning Strategy, Exhibit P-10, was approved by the Minister of Municipal Affairs March 2, 1979, and contains the following policies on industrial development.

> "P-1 It is the intention of Council to recognize light industrial and heavy commercial development as a priority objective for future growth of Port Hawkesbury.
>
> P-2 It is the intention of Council to promote, in conjunction with the Port Hawkesbury Chamber of Commerce the Light Industrial Park for secondary and services industrial land uses in order to expand the Town's tax base and to increase the employment opportunities in the immediate area.
>
> P-3 It is the policy of Council that those areas designated Industrial on the Generalized Future Land Use Map (Map 3) be reserved for that use.
>
> P-4 Notwithstanding Policy P-3, it shall be the intention of Council to allow specific industrial uses to locate on the waterfront that require waterfront and/or rail access and are consistent with the mixed uses of the area.
>
> P-5 Further to policy P-4 above, it shall be the intention of Council to allow recreation Open Space uses on the waterfront subject to the requirements of the Open Space (02) Zone and the Industrial Waterfront (M3) Zone requirements and also Commercial General (Cl) uses on the waterfront subject to Commercial General (Cl) Zone requirements and the requirements of the Industrial Waterfront (M3) Zone.
>
> P-6 It shall be the intention of Council to pursue the improvement and upgrading of the Port Hawkesbury Government Wharf by drawing the following conditions to the attention of various federal government authorities:

(i) wharf has a maximum 22 foot low tide water depth limitation preventing most commercial shipping from utilizing facility. Additionally, there is a severe siltation problem along the South face of the wharf;

(ii) wharf surface is 4 feet too low for commercial shipping requirements;

(iii) wharf surface is too narrow for truck traffic;

(iv) wharf lacks a fresh water line and 220V electrical servicing, and

(v) the facility is unable to support current and projected demand requirements because of the combination of the above (i - iv) factors.

P-7 Town Council of Port Hawkesbury supports and encourages the concept of a Strait of Canso Port Plan whereby specific sites are assessed and promoted to attract industrial and manufacturing development into the Strait area.

P-8 It is the intention of Council to recommend to senior levels of government that a feasibility study be undertaken to determine the industrial and heavy commercial potential of the Port Hawkesbury waterfront area. Special attention should be paid to the integrated development scheme of a yachting service facility, commercial government wharf, a marine walkway and marine related light industries.

P-9 It is a policy of council to zone the South-west corner of the townsite "industrial extractive (M2)" which will allow general industrial activities as well as industrial land uses involving the bulk storage of sand and gravel and the processing of mineral substances."

In relation to Policy P-9, Mr. Beasley commented that the area in question although now zoned M-2 was handicapped as a location for future industrial expansion by being privately owned and not presently serviced or accessible by public roads. With regard to Policy P-8, Mr. Beasley stated that development of the waterfront area would be difficult because of the small amount of land available without very expensive landfill.

Colin J. MacDonald, Chief Administrative Officer for the Town since 1981 gave evidence on the Town's financial situation and its ability to accommodate the subject property as an adjunct to the Industrial Park. Mr. MacDonald is a member of the management committee of the Industrial Park Commission. He was involved in the purchase of the two parcels of land which make up the subject property. A parcel of 72 acres was purchased for $75,000.00 and a parcel of 28 acres was purchased for $28,000.00, which is a total purchase price of $103,000.00.

Mr. MacDonald stated that the Town gets a special grant from the Province in order to balance its budget and has received this provincial assistance from the Province for approximately 15 years. He explained that the Town had installed sewer and water services in the early 1970s at the request of the Province. These services have a capacity for a population of 20,000. The 1981 census indicates a town population of 3850. Mr. MacDonald believed that a small modification to the Town's water treatment plant might be needed to service the 100 acres which the Town wishes to annex but that the plant has sufficient capacity to accommodate the subject property. Mr. MacDonald confirmed that neither industrial park alternative location #3 (the Nautical Institute site) nor the east end of town (alternative location #2) were serviced by the Town. The Town's primary interest is the tax revenue which could be derived from the subject property if it were developed as part of the Town's industrial park according to Mr. MacDonald.

In cross-examination, Mr. MacDonald acknowledged that the area at the east side of town which is zoned Industrial Extractive Zone (M-2) would also produce tax revenue for the Town although not in the same quantity, he thought, as the proposed extension to the existing industrial park.

Mr. MacDonald agreed that the Town receives a percentage of the tax revenue generated in the Municipality of the County of Richmond by Atomic Energy of Canada Limited, Gulf Canada Limited and Nova Scotia Pulp Limited, however he repeated that the Town was nevertheless financially dependant on the province and would like to sever that dependency.

It was Mr. MacDonald's opinion that the Town could proceed with half the development of the subject 100 acres if it believed it would recover its expenses quickly. To do this, the Town would use the $1.4 million which it has in a special reserve account if the Minister of Municipal Affairs gave his approval.
Mr. MacDonald confirmed that the land which is the subject of this application was purchased as defined in the deeds and that only the eastern boundary had been surveyed subsequently. He acknowledged that the Town had considered applying for annexation to extend from the current south town boundary east to highway 104 and south to the CNR tracks but felt that time was of the essence and so decided to apply to annex only the subject lands.

Mayor Almon Chisholm who is also the Chairman of the Town's Industrial Commission, defended the Town's application for annexation because the Town needs additional tax revenue and jobs, and commented on alternative areas suitable for industrial development. He stated that the Town was handicapped by the existance of major commercial blocks of land which have not been developed by their owners.

The industrial park was developed to encourage small service industries. The 50 acre parcel located at the east side of town was not a viable alternative location for industrial development he felt because the costs of servicing to the owner ensured that it was not about to be developed. He concluded that there were no suitable unserviced lands or serviced lands in the Town for industrial development.

In cross-examination, Mayor Chisholm acknowledged that a series of letters between himself and Warden Gordon Samson (Exhibits P-11 to P-14) written in the month of September, 1984, had discussed the possibility of joint development of the subject property with both costs and revenue to be shared, however, the Town's final position was that it was not interested in a joint project for the 100 acre subject property alone unless it included revenue sharing on other existing industrial properties as well. Mayor Chisholm stated that the Town Council had not discussed what it would do if the LEAD funding were not available. In his opinion the Town would not be likely to go ahead with the development of the subject property unless lots could be sold quickly and provincial approval for spending reserve funds was obtained.

Mayor Chisholm stated that the annexation of the subject property to give room for expansion of the Town's light industrial park was a necessity for the Town in order to obtain more jobs and to enable the Town to eliminate the necessity for special provincial grants.

Jim Davis, Finance Director of the Town since August 1980 filed the 1984 financial statements of the Town (Exhibit P-15) and the 1984 financial statements of the Port Hawkesbury Industrial Commission (Exhibit P-16) which had been requested by the Board. The financial statements of the industrial commission show that the Commission is funded by the Town (as determined by Council annually), the Cape Breton Development Corporation (one-third of the budget annually) and the provincial Department of Development (the lessor of $24,000.00 or one-half of operating expenditures annually). The Town's 1984 financial statements show revenues totalling $287,677.00 from tax-sharing agreements with Atomic Energy of Canada Limited, Gulf Canada Limited and Nova Scotia Pulp Limited.

Mr. Davis also filed certified copies of two deeds for the parcels of land which together are the subject of this annexation application. Exhibit P-17 is a deed dated July 24, 1984, conveying 28 acres from Lor Chediac to the Town; Exhibit P-18 is a deed dated July 30, 1984, conveying 72 acres from John Archie McMaster to the Town.

Counsel for the Municipality called Christopher Lowe, a Senior Planner with the firm of Underwood McLellan who specializes in industrial park forecasting and planning. Mr. Lowe has a masters degree in Planning and was qualified as a planning expert in industrial land development.

Mr. Lowe stated that he was retained by the Municipality to investigate independently the Town's need for additional industrial land. It was his conclusion, expressed in a report dated April 1985 and filed as Exhibit P-19, that the Town's "Light Industrial Park" was really a serviced commercial area and that there was ample room for either commercial or industrial development within the current town boundaries as well as an abundance of existing serviced industrial land in the Strait of Canso region. Mr. Lowe acknowledged that demand for industrial land was much more difficult to assess than demand for retail and service areas or residential and school facilities.

Mr. Lowe advocated the incremental approach to the provision of industrial land, servicing land only as needed with only a one or two year advance surplus at any time.

In summary Mr. Lowe stated in Exhibit P-19 that 1984 data from the Nova Scotia Department of Development indicated that the Port Hawkesbury Industrial Park is one of four industrial parks in the Strait of Canso area which together contain a total of 370 acres of which 342 acres are useable, and of which only 67 acres are occupied, which is a 20% occupancy rate. The same data source shows that the Port Hawkesbury Light Industrial Park is the only park with business tenants.

Mr. Lowe analyzed the Port Hawkesbury Light Industrial Park and concluded that based on the record of past land absorption the park had presently enough serviced vacant land in the newest phase to meet historic demand for about 5 years and enough serviced vacant and sold but under-utilizedland to meet historic demand for about 13 years.

Mr. Lowe reviewed the policies in the Municipal Planning Strategy, especially Policies P-1, P-2, P-3 and P-9 which state:

> "P-1 It is the intention of Council to recognize light industrial and heavy commercial development as a priority objective for future growth of Port Hawkesbury.
>
> P-2 It is the intention of Council to promote, in conjunction with the Port Hawkesbury Chamber of Commerce the Light Industrial Park for secondary and services industrial land uses in order to expand the Town's tax base and to increase the employment opportunities in the immediate area.
>
> P-3 It is the policy of Council that those areas designated Industrial on the Generalized Future Land Use Map (Map 3) be reserved for that use.
>
> P-9 It is a policy of council to zone the South-west corner of the townsite "industrial extractive (M2): which will allow general industrial activities as well as industrial land uses involving the bulk storage of sand and gravel and the processing of mineral substances."

Mr. Lowe referred to Exhibit P-21 which is a plan dated May, 1985, based on a plan prepared by the provincial Department of Development which was revised August 15, 1983. Exhibit P-21 shows land use and land utilization in the Port Hawkesbury Light Industrial Park. Mr. Lowe said that Exhibit P-21 indicates that the Town's industrial park contains many businesses which could locate in the Town's commercially zoned areas.

Using a zoning map of the town which is Schedule A referred to in the Town's Zoning (Land-use) By-law, Mr. Lowe amended it by adding his estimate of the "development potential" for various areas of the town. This map was filed as Exhibit P-20. Exhibit P-20 shows 82 acres of "development potential" in the Port Hawkesbury Light Industrial Park, approximately 50 acres in the Ship Harbour - Highway 4 area, approximately 8 acres in the Reeves Street commercial area, more than 100 acres in the Crandall Road area, and more than 75 acres in the Nautical Institute area. The total acreage shown to have "development potential" in the Town is approximately 315 areas.

Mr. Lowe concluded in his report Exhibit P-19, that "as Map 2 (Exhibit P-20) reveals, the Town currently has about 300 acres available for new industrial park-type growth. With this large inventory of land already available in the Town, the rationale for an additional 100 acres annexed from Richmond County must be questioned".

Mr. Lowe estimated the true cost of developing the subject 100 acres to the same standard as the existing third phase of the industrial park to be a total of $3.4 million or $42,000.00 per acre. At the proposed sales price of $17,800.00 per acre the Town's development expenses would not be recovered. He further stated that the park would need to generate 10 employees per acre to recover the costs of servicing but currently the ratio in the park is 5 employees per acre. In summary, Mr. Lowe believed that the Town's approach to industrial development was very expensive and its plans for the 100 acres which are the subject of this application may not provide the revenue which the Town wants. At the historic rate of sale of land in the industrial park of 4 acres per year, Mr. Lowe believed that there was existing a

10 to 15 years' capacity if it continued to be used, as the existing park is used, with almost no demand for real industrial uses.

In cross-examination, Mr. Lowe acknowledged that he had not interviewed any landowners in the industrial park or the industrial commission in assembling his data and drawing his conclusions. Mr. Lowe said that it was conceivable but not in line with historic trends that demand for industrial land would increase at a faster pace in the future. Asked by Counsel for the Town if, after a study of costs, the 100 acres in question was determined to be the best area to expand industrial development, would he not agree with that initiative, Mr. Lowe replied that he didn't believe that the other alternative areas he had suggested had been really studied by the Town. Mr. Lowe emphasized that these conclusions and opinions were related to industrial development rather than to the merits of the proposed annexation.

Mrs. Vera Doucet, a Councillor for six years in the Municipality, spoke on her own behalf expressing the opinion that the annexation was unnecessary because the Town had sufficient land available for industrial development within its boundaries.

Mr. Louis Digout, Chief Administrative Officer for the Municipality of the County of Richmond for 8 years, gave evidence on the Municipality's industrial development and its involvement with the lands which are the subject of this application. According to Mr. Digout, the lands in question were offered for sale to the Municipality sometime in the winter of 1984. The Municipality's industrial commission, to which the offer was referred, rejected the offer because it could not see a need for additional industrial park land.

Mr. Digout referred to Exhibit P-23, a study by KORB Planning and Design Consultants commissioned by the Richmond County Industrial Commission in the summer of 1983 and presented in the Winter of 1984. The study identifies five sites with industrial potential, one of which is a parcel abutting the Town boundaries which includes the lands which are the subject of this application. The Municipality has one existing serviced 135-acre industrial park at Louisdale.

Mr. Digout disagreed that the subject 100 areas are the most suitable lands for light industrial development in the Town. He also disagreed with the Town's position that the proposed change in Town boundary would not have any impact on the financial status or property tax base of the Municipality. Although the previous tax revenue from the property had been approximately $100.00, because of the Town's purchase price, Mr. Digout believed that increased assessment could yield, depending on the tax rate, $1,200.00 to $1,500.00.

Mr. Digout also filed two letters, Exhibits P-24 and P-25, on the subject of the application by the Port Hawkesbury Industrial Commission for LEAD funding to develop the lands which are the subject of this annexation application. Exhibit P-24, dated May 10, 1985, is a letter of enquiry from Mr. Digout to Mr. H.S. Dunn, coordinator of the LEAD program with Employment and Immigration Canada, on the status of the funding application by the Town's Industrial Commission. Exhibit P-25 is a letter dated

May 13, 1985, from Mr. Dunn to Mr. Digout which confirms that the application by the Port Hawkesbury Industrial Commission made February 27, 1985, was not approved. According to Mr. Digout, this represented a second refusal of funding under the LEAD program.

In cross-examination, Mr. Digout acknowledged that the Municipality had no available servicing for the subject 100 acres and that the Municipality had no municipal planning strategy or land-use by-law. Mr. Digout concluded that there was no necessity for the annexation because there was no substantial demand for industrial land.

In rebuttal evidence, Mr. MacDonald outlined the Town's debt load for streets, sidewalks, sewer and water which totals $2.4 million and on which the Town repays an average of 22% of the debt charges financed out of current revenues, the balance being paid by the Province.

Mr. Beasley in rebuttal evidence, concluded that if LEAD funding were not available to the Industrial Commission, it would be necessary to apply to the Federal Department of Regional Industrial Expansion (DRIE) or the Strait of Canso Industrial Development Authority (SCIDA) for the "usual" funding arrangements which had been used in the past. This consisted of a cost sharing arrangement made up of a 50% share funded by the federal level 30% by the Province and 20% by the Town. Mr. Beasley was unaware whether Town Council had made a commitment to this cost sharing arrangement.

In summary argument at the conclusion of the hearing, Counsel for the Town stressed that the Town was applying for annexation in a dual capacity, both as the municipal unit wishing to annex and also as the owner of the land for which the annexation application has been made. He stated that the Town believed that the annexation requested was both necessary and expedient as required to be determined by the Board in Section 8 of the Municipal Boundaries and Representation Act. It was the Town's conviction that the requested annexation would not adversely affect either the Town or the Municipality. The Town had no intention of adversely affecting its ratepayers by inflicting additional long-term debt upon them and if the LEAD funding application were not approved the Town would have to develop the additional acreage for the industrial park in stages as funds became available. The Town believes that it is planning in a sound and responsible manner for industrial development by purchasing the subject lands and applying to annex them rather than allowing "helter-skelter" industrial development in the Town. Other possible sites for industrial development in the Town are unserviced or expensive to service or unavailable. The expense of servicing the subject lands would be far less than servicing any other area. The Municipality on the other hand, was not in a position to either service or to provide road access to the subject property.

Counsel for the Municipality argues that at the time of application as well as at the time of hearing of the application, there was no evidence that the Town could proceed to develop the subject lands without external funding. Furthermore the Town's predicted costs for development of the lands were unrealistic and the evidence of the Municipality's expert witness on development costs was uncontradicted. If funds were found they could be directed to other locations within the Town. There was no historic record of a need for larger industrial lots than are currently available in the Town's industrial park, therefore there was no necessity for the annexation. Any new industrial land would have to be serviced whether it were inside or outside the Town. The development costs of areas other than the subject lands had not been adequately explored by the Town. There had been no independent concrete evidence presented that privately owned lands within the Town were completely unavailable for sale.

Counsel for the Municipality concluded that since there was no evidence of a demand for larger industrial lots, and there were sufficient lots available for the foreseeable future based on historic demand, there was no necessity for the requested annexation. Since there was no evidence that the Town could or would develop the subject lands without external funding which is currently unavailable, there was no argument in favour of the annexation on the grounds of expediency.

This annexation application was received by the Board on February 4, 1985, pursuant to the Municipal Boundaries and Representation Act, R.S.N.S., 1967, Chapter 195, as amended. The hearing of this application took place May 1, 2 and 15, 1985. On October 1, 1985, the Municipal Boundaries and Representation Act, S.N.S. 1982, Chapter 10, came into force. With the proclamation of Chapter 10, S.N.S. 1982, the Municipal Boundaries and

Representation Act, its predecessor, Chapter 195 R.S.N.S., 1967 the Municipal Boundaries and Representation Act, was repealed.

The Interpretation Act, R.S.N.S., 1967, Chapter 151 contains sections dealing with the repeal and amendment of enactments of the Legislature. Section 22(3) reads as follows:-

> "22(3) Where an enactment is repealed and other provisions are substituted for it:
>
> (a) every person acting under the enactment shall continue to act as if appointed under the provisions so substituted until another is appointed in his stead;
>
> (b) every bond and security given by a person appointed under the enactment remains in force, and all offices, books, papers and things made or used under the enactment shall continue to be used as before the repeal as far as consistent with the substituted provisions;
>
> (c) every proceeding taken under the enactment shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;
>
> (d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or in a proceeding in relation to matters that have happened before the repeal, the procedure established by the substituted provisions shall be followed as far as it can be adapted thereto;
>
> (e) when any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions so substituted, the penalty, forefeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly."

The current Municipal Boundaries and Representation Act sets out the factors which the Board must consider in coming to a decision on an application as follows:

> "6. Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

The former Municipal Boundaries and Representation Act contained an identically worded section as Section 8 of the Act. The current Act however, contains a section which gives additional factors to be considered by the Board in an application for annexation. Section 22(1) states:

> "22(1) The hearing of the application shall be in accordance with the Municipal Board Act and the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for, grant the order of amalgamation or annexation."

In order to conform to the new Municipal Boundaries and Representation Act, as prescribed by Section 22(3)(c) of the Interpretation Act, the Board must take into account not only the factors set out in Section 6 of the Municipal Boundaries and Representation Act - "The necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers and all other relevant matters that in the opinion of the Board appear to be necessary or expedient" - but also the factors set out in Section 22(1) - "The best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for".

In the opinion of the Board, the Town has not proved that annexation of the subject lands is a necessity. There is a considerable number of vacant lots in the existing Light Industrial Park. As well there are commercially zoned and serviced areas elsewhere in the town which could accommodate the types of uses currently represented in the park which are not strictly industrial - retail, service and wholesale operations. The Light Industrial Park, established 15 years ago, currently contains a total of 65 lots of which approximately 20% are unsold, indicating a steady, though comparatively slow growth in demand.

The Town has argued that the annexation of the subject lands which it has purchased is expedient, much as the application for annexation of adjacent lands by the Town of Bridgewater was considered by this Board to be expedient in its decision on that application, dated October 18, 1984. In that case, the Town of Bridgewater argued that it could best service the area with streets, water and sewer and so allow for the expedient completion of a residential development where a small portion of the developer's lands extended beyond the Town boundary into the adjacent municipality. The Town of Port Hawkesbury argued that it can more effectively and efficiently provide local services to the lands which are the subject of this annexation application, and that the Town's development controls which it could apply if the annexation request were granted, would protect existing ratepayers who own adjoining lands within the Town.

Although there are some similarities between the annexation applications of the Towns of Bridgewater and Port Hawkesbury, there are differences as well. In the Bridgewater application, the subject lands totalled a comparatively small 14.78 acres of which the Town owned 4.4 acres in parklands and the remainder was undeveloped land owned by the developer or residential lots owned by a number of ratepayers. In the Port Hawkesbury application, the subject lands total 100 acres in two parcels, which are only slightly less than the total acreage of the adjacent Light Industrial Park of 105 acres (of which 98 acres are useable and 67 acres are currently occupied).

In the Bridgewater case, the Town applied for annexation at the request of the developer; in the Port Hawkesbury case, the Town itself, through its Industrial Commission, would be the developer, subject to funding and marketability of the lands in question.

The compact edition of the Oxford English Dictionary, 1971 edition, gives the following definition for "expediency";

> " The quality or state of being expedient; suitability to the circumstances or conditions of the case; fitness, advantage".

In the opinion of the Board, the expediency of the annexation by the Town of the subject lands for future expansion of its Light Industrial Park, has not been established by the evidence adduced by the Town. The unsuitability of other areas within the Town for industrial development was not proven. To annex parcels of land which in total acreage almost equal the size of the Town's existing Light Industrial Park, when there remains considerable vacant land in that park and when other sizeable parcels of vacant land exist within the Town's boundary, does not seem to the Board to meet the test of "suitability to the circumstances or conditions of the case".

That is not to say however, that the Town may not, at another time, be able to establish that the annexation of 100 acres of land from the Municipality of the County of Richmond is the most expedient way in which the Town can augment its stock of lands for industrial use.

Having considered the evidence and argument presented by the parties and having visited the subject site, the Board concludes that neither necessity nor expediency have been proven in this annexation application. The Board heard evidence on the financial position and obligations of the Town. While it notes the record of special financial assistance which the Town has received from the Province over a number of years, the Board is aware that other Towns in Nova Scotia have been in similar circumstances (NSMB-2-83-MB, Town of Oxford, p.15) and does not consider this sufficient reason to justify an order for annexation. Because of the evidence of uncertainty of funding for the development of the lands for which the annexation application has been made, the Board is unable to estimate the burden of taxation upon the ratepayers of the Town, if this annexation application were granted.

In relation to the additional factors to be considered by the Board which are set out in Section 22(1) of the Municipal Boundaries and Representation Act, the Board assumes that the area to be considered in the phrase "the best interests of the inhabitants of the area" is the area for which the annexation application has been made. From the evidence and observations, this area is uninhabited. "The financial implications .... of the order applied for", have been considered by the Board as far as possible. The "social implications of the order applied for", in the opinion of the Board, is not a relevant factor in an application for annexation of this uninhabited area.

Upon consideration of the evidence and argument presented by the parties to this application, taking account of the factors to be considered by the Board according to Sections 6 and 22 of the Municipal Boundaries and Representation Act, the Board determines that it will not issue an order for annexation of the area adjoining the southern boundary of the town presently within the Municipality of the County of Richmond which the Town of Port Hawkesbury has made application to annex.

There will be no costs to either party.

An order will issue pursuant to Section 29 of the Municipal Board Act.

DATED at HALIFAX, Nova Scotia, this 17th day of January, A.D., 1986.

E A Salton

ELIZABETH SALTON
Vice-Chairman
(formerly ELIZABETH LAWRENCE)

RICHARD L. WELDON
Member

DISSENTING OPINION

I have read the decision of my fellow Board Members. I am in substantial agreement with the facts as stated in that decision but I have reached a different conclusion. In my opinion, the Board should grant an order for the annexation of the 100 acre parcel of land in the Municipality of the County of Richmond to the Town of Port Hawkesbury.

The land proposed to be annexed is located contiguous to the southern boundary of the Town and the Town's Light Industrial Park. The Light Industrial Park, consisting of 105 acres, was established in 1968. It was developed in three phases with lots in Phase 3 first offered for sale in February 1985. There are 3 lots remaining in Phases 1 and 2 of the Park and approximately 8 to 10 lots remaining in Phase 3 (the sale of 3 lots in Phase 3 were being negotiated at the time of the hearing). The area proposed to be annexed is approximately the same size as the area established by the Town in 1968 for its industrial park. It is agreed by all parties that the subject site is an excellent site for industrial development.

The subject lands were originally offered for sale to the Municipality in 1984. The Municipality rejected the offer because it had already established an industrial park in Louisdale and it did not have a need for the land.

The land was subsequently offered for sale to the Town of Port Hawkesbury. Town officials, encouraged by the response the Industrial Commission was receiving to the land it was selling in Phase 3 of the existing industrial park and seeing an opportunity to acquire good land for industrial development adjacent to its existing park, purchased the land. The Town now wished to annex the land so it could proceed with the orderly development of the land as part of its industrial park thus generating job opportunity and increasing the Town's tax revenue at the same time reducing the amount of special assistance the Town must receive from the Province.

The annexation of the 100 acres to the Town would have almost no impact on the Municipality. The amount of land involved is insignificant in comparison with the total land acreage of the Municipality, the loss of tax revenue to the Municipality would be approximately $100.00 and the Municipality has no intention to develop the land on its own or promote its development. All of the Municipality's existing development, that is; industrial, commercial and residential, are in areas which are very remote from the subject site.

The Municipality's argument against the Town's annexation application is not that the proposed annexation should not be allowed because it will have a negative impact on the Municipality but rather that the Town has sufficient land within its boundaries for industrial development and does not need the 100 acres located in the Municipality.

The Municipality retained Mr. Christopher Lowe, a Senior Planner with the firm Underwood McLellan, to assess the Town's need for additional industrial land. Mr. Lowe concluded in his report filed as Exhibit P-19, that "as Map 2, (Exhibit P-20) reveals, the Town currently has about 300 acres available for new industrial park-type growth. With this large inventory of land already available in the Town, the rationale for an additional 100 acres annexed from Richmond County must be questioned".

Map 2 (Exhibit P-20) indicated there was 82 acres of "development potential" in the Port Hawkesbury Light Industrial Park, approximately 50 acres in the Ship Harbour-Highway 4 area, approximately 8 acres in the Reeves Street commercial area, more than 100 acres in the Crandall Road area, and more than 75 acres in the Nautical Institute area.

Mr. Lowe's calculation of 315 available acres is not quite accurate. The 82 acres of "development potential" he listed for the Light Industrial Park is not available for future industrial development. Much of this land has been sold and is being used. However, it is Mr. Lowe's opinion that the land is not being utilized efficiently and that if existing businesses were relocated within the Park they could be located on 18 acres of land thus leaving approximately 82 acres available for future development. Therefore Mr. Lowe's claim that there are 82 acres of land available for development in the existing park is inaccurate.

The 100 acres of land available in the Crandall Road area is not as suitable for industrial development as the subject land because it is necessary to pass through an existing residential development to get to these lands. Mayor Chisholm also indicated a need for additional land for residential development within the Town and he indicated that the Crandall

Road area was being targeted for future residential development. Mr. Lowe did not make a study of the need for residential land within the Town.

The 50 acre parcel of land located in the Ship Harbour-Highway 4 area, which is Zoned M-2, is privately owned and is not likely to be developed because of the high cost of servicing this area and gaining access to the area. The 75 acre parcel of land located behind the Nautical Institute site is located in the north end of the Town which is the opposite end of the Town from the existing industrial park. Town Officials indicated that this site is suitable for industrial development but their hope is that the land will be developed with other institutional uses compatible with the Nautical Institute use of the land.

Mr. Lowe did not compare the suitability of the proposed site for future industrial expansion with the alternative sites he had suggested. He only reached a conclusion that there was land available for industrial development in the Town.

Mr. Lowe did not address the feasibility of developing other areas in the Town in comparison with the subject site. He only stated that he believed the Town did not give serious consideration to these areas. Mr. Lowe is adamantly opposed to the development of large blocks of industrial park land when there is no demand for the land. He also expressed the opinion that there was a large supply of industrial land in the Strait of Canso area and the only industrial park which has tenants is the Port Hawkesbury Light Industrial Park.

The issue to be determined in this application is whether the Board should issue an order to annex the 100 acre parcel of land in the Municipality of the County of Richmond to the Town of Port Hawkesbury. The grounds listed by the Town in its application are as follows:

> "(a) That the lands described in Schedule "A" adjoin the existing Light Industrial Park of the Town of Port Hawkesbury;
>
> (b) The Town wishes to expand the Light Industrial Park and the lands described in Schedule "A" are the most suitable for such an expansion;
>
> (c) The lands described in Schedule "A" can be serviced with sewer and water by the Town and any streets which would be constructed would be an extension of existing streets in the Town;
>
> (d) Since the lands described in Schedule "A" are vacant lands, the change of the Town boundary as applied for will not have any impact upon the financial status of the Municipality of the County of Richmond nor will it have an impact respecting the property tax base of the said County.
>
> (e) The lands described in Schedule "A" are only accessible from the Town and can only be properly developed utilizing the sewer and water services and streets presently located in the Town."

The Board in considering whether to issue an annexation order must consider the factors set out in Section 6 and Section 22(1) of the Municipal Boundaries and Representation Act, S.N.S. 1982, Chapter 10 as follows:

> "6. Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."
>
> "22(1) The hearing of the application shall be in

> accordance with the Municipal Board Act and the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for, grant the order of amalgamation or annexation."

One of the factors to be considered by the Board is the necessity or expediency of the order applied for.

The compact edition of the Oxford English Dictionary 1971 Edition gives the following definition for "expediency";

> " The quality or state of being expedient; suitability to the circumstances or conditions of the case; fitness, advantage."

In my opinion, the expediency of the annexation application has been established by the Town.

The land proposed to be annexed is located immediately adjacent to the Town's existing industrial park and is the most suitable location for future industrial development by the Town including the areas mentioned by Mr. Lowe. The existing industrial park has been in its present location since 1968 and the proposed site to be annexed is an excellent site for industrial development. There will be no problems with land-use conflicts with adjacent property owners. In my opinion in the Town of Port Hawkesbury it makes sense and provides good planning for industrial development to be located in one area of the Town rather than scattered throughout the Town which increase the chances for land-use conflicts.

The subject lands are only accessible from the Town. The Town can provide access to the site and also sewer and water services by extending roads and the sewer and water services which exist in the present industrial park.

In my opinion the site is an appropriate site for the Town to develop. At the same time the Municipality has no plans or need for the land and the annexation of the land to the Town would not have any adverse impact on the Municipality or the residents.

Policy 1 and Policy 2 of the Town's Municipal Planning Strategy (see Page 17 of majority decision) sets out the intention of the Council of the Town to recognize light industry and heavy commercial development as a priority objective for future growth of Port Hawkesbury and the promotion of the Light Industrial Park to expand the Town's tax base and increase employment opportunities in the immediate area. The subject land was offered for sale to the Town unsolicited, after the Municipality refused to buy it. When the Town purchased the land, it was following its long term plan for industrial growth in the Town and the promotion of its industrial park. It seems appropriate that if the Town was going to develop the site, it should receive the tax benefits from industries located in the area and therefore it is expedient for the Town to apply to annex the area. Allowing an order for annexation now will permit the Town to proceed with its objective of promoting industrial development with the certainty that the land is available for industrial expansion and the Town will receive the tax benefits from industries located in the area.

I disagree with my fellow Board Members that an order for annexation cannot be issued until such time as the Town no longer has land in other areas of the Town suitable for industrial development. In my opinion the Town has satisfactorily explained why the subject site is a better site for industrial park development than the areas mentioned by Mr. Lowe.

Having considered the evidence and the argument of Counsel, having visited the site and having taken into consideration all the factors mentioned in Section 6 and 22(1) of the Municipal Boundaries and Representation Act, I would issue an order for the annexation of the area adjoining the southern boundary of the Town presently within the Municipality of the County of Richmond to the Town of Port Hawkesbury.

DATED at HALIFAX, Nova Scotia, this 17th day of January, A.D., 1986.

DARRYL W. WILSON, Member.

Re Village of Brooklyn

VILLAGE SERVICES ACT--BOUNDARY DESCRIPTION--BEST INTERESTS OF INHABITANTS OF AREA--VILLAGE SERVICES ACT, SS. 14, 14A, 43(1)

This is an application by the Commissioners of the Village of Brooklyn pursuant to s.14 of the Village Services Act to more fully describe the boundaries of the Village. Some uncertainty exists with respect to the northern boundary and the northern parts of the eastern and western boundaries of the Village.

HELD: The application is approved.

The Board is required by s.14A(1) of the Village Services Act to consider whether the application appears to be "in the best interests of the inhabitants of the area." The Board determines that the application is in the best interests of the inhabitants and should be approved.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Village Service Act, R.S.N.S., 1967, Chapter 329, as amended;

- and -

IN THE MATTER OF: An application by the Commissioners of the Village of Brooklyn to more fully describe the boundaries of the Village of Brooklyn in the Municipality of the County of Queens.

BEFORE: ELIZABETH SALTON, Vice-Chairman

COUNSEL: GERALD B. FREEMAN, Q.C., and JAMES BURRILL, Articled Clerk, for the Commissioners of the Village of Brooklyn

DECISION

A hearing was held by the Board pursuant to an Order of the Board dated August 19, 1985 in the Brooklyn Community Hall in the Village of Brooklyn, on September 24, 1985, on an application by the Commissioners of the Village of Brooklyn dated June 24, 1985, and received by the Board June 28, 1985, to more fully describe the boundaries of the Village of Brooklyn in the Municipality of the County of Queens.

The application by the Village Commissioners was made pursuant to Section 14 of the Village Service Act, as amended in 1984, which states:

"14(1) An application to the Board by the Commissioners to more fully describe or change the boundaries of a village may be made to the Board by

(a) the commissioners; or

(b) an owner of real property in the area proposed by the owner to be added to or taken from the village

(2) An application to the Board by the commissioners to change the boundaries shall be accompanied by

(a) a by-law passed by the commissioners describing the boundary change; and

(b) a petition of two thirds of the owners of real property in the area proposed to be added to or taken from the village, approving of the change.

(3) An application to the Board by an owner of real property in the area proposed to be added to or taken from the village shall be accompanied by a petition of two thirds of the owners of real property in the area proposed to be added to or taken from the village, approving of the change, and the application shall contain the name and mailing address of the person to whom notices and communication may be given with respect to the application.

(4) Upon receipt of an application, the Board shall hold a hearing with respect to the application.

(5) Notice of the date, time and location of the hearing shall be served upon the clerk of the village commissioners, the clerk of the municipality of which the village forms a part, the person named in subsection (3), if any, and the Minister.

(6) At the hearing the Board shall hear any interested person or municipality.

14A(1) If it appears to the Board to be in the best interests of the inhabitants of the area, it shall order that the boundaries of the village be more fully described or changed.

(2) The order made pursuant to subsection (1) shall

(a) define the boundaries of the village, with any alterations made as a result of the hearing;

(b) state when the new boundaries are to be effective; and

(c) contain such directions respecting the implementation of new boundaries as the Board sees fit."

The application by the Commissioners of the Village of Brooklyn, Exhibit B-1, was made by letter dated June 24, 1985, written by John Kral, Clerk to the Village Commissioners, which states:

> " On behalf of the Commissioners of the Village of Brooklyn, I hereby apply to the Municipal Board for approval of the By-law passed by the Commissioners of the Village of Brooklyn to more fully describe the boundaries of the Village of Brooklyn.
>
> Enclosed herewith in support of this application are the following documents:
>
> 1. By-law for which approval is sought, duly certified by the Clerk;
> 2. Resolution of the Commissioners authorizing the application.
> 3. My affidavit setting forth the facts relied upon;
>
> Your consideration of this matter will be appreciated."

In addition to the items mentioned in Mr. Kral's letter of application, his letter was accompanied by two other items: a copy of a resolution of the Council of the Municipality of Queens in support of the Village Boundary By-law, approved by Council June 11, 1985, and signed and certified by L.D. Robertson, Municipal Clerk, on June 21, 1985; and a letter from Shirley L. Nixon, Town Administrator, Town of Liverpool, to Mr. Gerald Freeman, Solicitor, Municipality of the County of Queens, dated April 22, 1985, stating that the Town Council had "by resolution approved the By-law and support same."

The Affidavit of Mr. Dexter, Chairman of the Village Commissioners, sworn to April 10, 1985, reads as follows:

> " I, A.M. Dexter of Brooklyn in the County of Queens and Province of Nova Scotia make oath and say as follows:
>
> 1. I am the Chairman of the Village Commissioners of the Village of Brooklyn and as such have personal knowledge of the matters herein deposed to.
>
> 2. The Village of Brooklyn consists of Municipal Districts 5 and 6 of the Municipality of the County of Queens.
>
> 3. The Village of Brooklyn since gaining village status in 1959 has used the boundary description of Lot 5 and Lot 6 as the description of its own boundaries; the descriptions in use in 1949 were superseded in the 1960s by new boundary descriptions for Lots No. 5 and 6 approved by the Nova Scotia Board of Commissioners of Public Utilities under the Municipal Boundaries and Representation Act; the areas included were essentially the same but uncertainty existed as to the language;
>
> 4. The most recent description of Lot No. 5 establishes its point of beginning correctly with reference to North Co-ordinate No. 62 on Canada Sheet 21 A/2 East Half, Series A 791 Edition One, Army survey Establishment, National Topographic Series, Surveys and Mapping Branch, Department of Mines & Technical Surveys, 1954; it does not however correctly relate the point of beginning to West Co-ordinate No. 82 on the said map;
>
> 5. The said description contained in Section 2 of the By-law was prepared by Donald Wagstaff, Municipal Councillor for District Number 6, retired Chief Surveyor for Bowater Mersey Paper Company Limited from plans, survey information and other material available to him; the boundaries were not surveyed on the ground;
>
> 6. The location of the eastern and western boundaries of the Village of Brooklyn at the southern ends have been clearly understood since 1949 and have not been subject to change; the southern boundary is the shore of the Liverpool Harbour; such uncertainty as exists was with respect to the northern boundary and the northern parts of the eastern and western boundaries which lie in areas entirely without population;
>
> 7. To the best of my knowledge, information and belief the new description more fully and more certainly describes boundaries that have not changed in location since Brooklyn gained village status; no change in the location of the boundaries was intended by the new description and to the best of my knowledge, information

> and belief, no change has been made; the principal improvement has been to combine the Village of Brooklyn in one description rather than describing it as two separate municipal districts."

The above Affidavit "setting forth the facts relied on" was the Affidavit of A.M. Dexter, Chairman of the Village Commissioners, rather than the Affidavit of Mr. Kral as stated in Mr. Kral's letter of application. The resolution of the Village Commissioners was certified but undated. The draft by-law describing the proposed village boundaries was signed and certified but undated. To correct or amend these matters Counsel for the Village Commissioners submitted a letter dated September 23, 1985, which was filed as Exhibit B-2. It states:

> " The intention of this letter signed by the Chairman and Clerk of the Commissioners of the Village of Brooklyn under Seal of the Village Commission is to correct any informalities which may exist in the application by the Commissioners of the Village of Brooklyn to the Municipal Board to more fully describe the boundaries of the Village of Brooklyn.
>
> By Resolution of the Commissioners of the Village of Brooklyn passed the 12th day of February, 1985, it was resolved that the Commissioners of the Village of Brooklyn apply to the Nova Scotia Municipal Board and to the Minister of Municipal Affairs for approval of a by-law bearing even date with the resolution for the purpose of more fully describing the boundaries of the Village of Brooklyn. The Resolution further provided that such application be prepared by the clerk and executed by the chairman and the clerk on behalf of the Commission.
>
> The application to the Municipal Board was made by letter signed by John Kral, clerk of the Commissioners, but not by the chairman.
>
> The letter to the Municipal Board dated June 24, 1985, and signed by John Kral, Clerk of the Commission, is hereby adopted, approved, ratified and confirmed as an application prepared by the clerk and executed by the chairman and the clerk on behalf of the Commissioners under the seal of the Commission of the Village of Brooklyn.

> It is hereby authorized that the by-law submitted with the application be dated to show that it was passed by the Commissioners of the Village of Brooklyn, on the 12th day of February, 1985, the same day as the Resolution, and that the certificate executed thereon by the Chairman and the Clerk of the Commission of the Village of Brooklyn be dated the said 12th day of February, 1985.
>
> It is hereby authorized that the said copy of the said resolution be dated to show that the same was passed on the said 12th day of February, 1985.
>
> The Commissioners of the Village of Brooklyn hereby undertake to pay all costs of the application to more fully describe the boundaries of the Village of Brooklyn, including all costs of advertising the hearing to be held at Brooklyn, Queens County, Nova Scotia on the 24th day of September, 1985."

The above letter was signed by Atwood Dexter, Chairman, and John Kral, Clerk and sealed.

Evidence was adduced that the Notice of Hearing of this application by the Commissioners of the Village of Brooklyn had bee duly advertised and that those persons required to be served with Notice of Hearing as set out in an order of the Board dated August 19, 1985, had been served. The Board accordingly assumed jurisdiction to hear the application.

Counsel for the Village Commissioners called four persons to give evidence on the application. No other persons in attendance gave evidence. There was no evidence in opposition to the application.

Donald Wagstaff, a licensed Nova Scotia Land Surveyor since 1951 who has lived in Brooklyn since 1945, and retired as Chief Land Surveyor with the Bowater Mersey Paper Company in 1983, gave evidence on the history of the boundaries of the Village of Brooklyn. Mr. Wagstaff was formerly a member of the

Village Commission for approximately 10 years and at the time of the hearing was a Councillor representing District 6 in the Municipality of the County of Queens, an office he had held for the previous 9 years.

Councillor Wagstaff said that he was generally familiar with the boundaries of the Village but that it was very difficult to know where they were exactly, particularly in the area from the Town of Liverpool boundary to Herring Cove Lake.

Councillor Wagstaff related the description in the by-law passed by the Village Commissioners to the map (Schedule A) which accompanied Exhibit B-2.

There was some discussion about the proper spelling for the name of the cove that lies at the southeast corner of the proposed village boundary, which appears as "Frellicks' Cove" in the by-law and as "Fralick Cove" on the map referred to above. Counsel for the Village Commissioners and Councillor Wagstaff agreed that the proper spelling for the name of the cove should be "Fralic", that being the usual spelling of the name in the area where the cove is located.

Councillor Wagstaff noted that the description of the boundaries refers to the "northeastern most points" of the aforementioned cove, but the map which is Schedule A to the application shows that the eastern boundary of the village runs to the northwestern point of that cove. Councillor Wagstaff agreed that the written description took precedence over the representations on Schedule A which is in error.

Councillor Wagstaff stated that the village boundary

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and thirdly with respect to an environmental review of the Tidewater (Metro Aggregates) quarry between 1982 and 1984. He is currently the Chairman of three committees involved with the Waverley area, namely, the Waverley Area Environmental Standards Committee, the Tidewater Monitoring Board and the Cobequid Monitoring Board. The first of these committees is involved in a process of recommending environmental standards to the Minister of Environment for the Waverley area. All three committees report to the Minister of Environment and all have representatives of the Waverley community on them.

Mr. Coulter was asked if he was aware of any environmental problems within the proposed boundaries of the Village. He responded by stating that he has no concerns that the environment will be abused as a result of Waverley attaining Village status. He said if he had any concerns at all it would relate to the Lake Major watershed which has been designated as a protected watershed under the provisions of Section 17(1) of the Water Act, R.S.N.S. 1967, c. 335 as amended. He stated that there were no specific restrictions on land use within the watershed area at this time. Although the watershed had been designated by the Minister on April 8, 1986, it would not come into effect until publication of the designation had taken place in the Royal Gazette. Mr. Coulter identified as Exhibit W-19, a copy of a ministerial order signed by the Minister of Environment on April 8, 1986 which contains a metes and bounds description of the "Protected Water Area" which is shown on a compiled plan dated February 5, 1984, revised December 10, 1984, signed set out in the proposed by-law passed by the Village Commissioners would lead to no major or radical changes in the village boundaries. He believed that there were no property owners in the Village of Brooklyn either left out of the Village or taken into the Village by this (amended) description. The intention of the new description, he said, was to clarify and confirm the Village boundaries, and to define boundaries for the Village as close as possible to the boundary location which had been generally understood throughout the existence of the Village.

Mr. Leon Robertson, Municipal Clerk for the Municipality of the County of Queens since 1974, gave evidence that he received a copy of the Notice of Hearing on August 20, 1985 which he later communicated to members of his Council. Mr. Robertson read a copy of a draft resolution provided to Counsel for the Village by letter dated July 22, 1985, which resolution was subsequently passed by his Council at the July meeting. The resolution states: "Be it resolved that the Municipality of Queens approve and support the boundaries of the Village of Brooklyn in having their southeastern corner on the shore of Fralic's Cove whether suc corner be found to be the northeasternmost or the northwesternmost point of the said Fralic's Cove". The approval of the above motion followed the approval by the Municipal Council in June, 1985, of the more general motion of approval of the proposed Village boundaries.

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by John C. MacInnis, N.S.L.S., of the Lake Major Watershed which forms a portion of the City of Dartmouth Water Supply. The western boundary of that portion of the Lake Major watershed which lies within the boundaries of the proposed Village is shown on a map filed with the Board as Exhibit W-28. Approximately one-third of the proposed Village lies within the Lake Major Watershed; all of which is located east of Highway 118 (the Waverley to Dartmouth Road). Lake Major is presently in use as the main source for the municipal water supply for the City of Dartmouth.

The next witness was Gordon Snow, the councillor from District No.14 in the Municipality of the County of Halifax. He stated that the community of Waverley lies within his district. He stated that the Council of the Municipality of the County of Halifax supports the application by the residents of Waverley to achieve village status and had unanimously passed a resolution to that effect. In his opinion the demand for municipal services in Waverley was no greater than in other communities. He was of the opinion that village status was desired by the people of Waverley and he personally supports the application. He could not forsee any problems arising between the community of Waverley and the Municipality of the County of Halifax as the result of Waverley achieving village status. He was not aware of any opposition to the application either from the people of Waverley or from the surrounding area. He thought there would be co-operation between the village commissioners and the municipal council.

Mr. Shirley Nixon, administrator for the Town of Liverpool for the past 2½ years gave evidence that he had received a copy of the Notice of Hearing although he was not certain of the date of its receipt. The Town Council had been made aware of the intentions of the Village Commissioners to more fully describe the Village boundaries at the March 1985 meeting and approved at the April 17, 1985 meeting the recommendation of its solicitor that the proposed village boundaries be approved.

Councillor Lynn Whynott, who had represented District 5 in the Municipality of the County of Queens for six years, endorsed the Village boundaries as set out in the proposed by-law of the Village Commissioners and stated that the description of the boundaries in that by-law enclosed what she thought of as the Village of Brooklyn.

In coming to a decision on this application to more fully describe the boundaries of the Village of Brooklyn, the Board is required by Section 14A(1) of the Village Service Act. consider whether the application appears to be "in the best interests of the inhabitants of the area". From the evidence adduced at the hearing and from the Affidavit of the Chairman of the Village Commissioners, the Board determines that the application by the Village Commissioners of Brooklyn in the Municipality of the County of Queens is "in the best interests of the inhabitants of the area" and should be approved.

An Order will issue approving the boundaries described in "The By-law to More Fully Describe the Boundaries of the

Village of Brooklyn" passed by the Village Commissioners February 12, 1985, as amended by an alteration to the spelling of Fralic's Cove resulting from the evidence adduced at the hearing of the Board. The boundaries of the Village of Brooklyn shall be described as follows:

> All those certain districts (better known as polling districts 5 and 6) comprising of the Village of Brooklyn in the County of Queens and more particularly bounded and described as follows:
>
> Beginning at a point where the northern boundary of the Town of Liverpool is intersected by North Co-ordinate No. 62 on Canada Sheet 21 A/2 Edition Two, Series A791 of the National Topographic Series Maps produced by the Surveys and Mapping Branch of the Department of Energy, Mines and Resources 1974.
>
> Thence following North Co-ordinate No. 62 North to a point where the same intersects Herring Cove Brook for the first time;
>
> Thence in a Northeasterly direction following a straight line drawn between the above mentioned point and the point where Solomon Brook, also known as Halfway or Wentzell's Brook intersects Highway No. 3;
>
> Thence southerly following a straight line from the said point of intersection of said Solomon Brook and Highway No. 3 to the Northeastern most points of Fralic's Cove on Liverpool Bay;
>
> Thence in a westerly direction following the High-water line of said Liverpool Bay until it comes to the northern boundary of the Town of Liverpool;
>
> Thence in a northwesterly direction along the said boundary of the Town of Liverpool to the place of beginning.

The revised boundaries shall be effective upon the approval of the Minister of Municipal Affairs of the by-law passed February 12, 1985, by the Village Commissioners of Brooklyn in the Municipality of the County of Queens, pursuant to

Section 43(1) of the Village Service Act.

DATED at HALIFAX, Nova Scotia, this 14th day of March, A.D., 1986.

EASalton

ELIZABETH SALTON
Vice Chairman

Re Certain Ratepayers of Waverley

VILLAGE SERVICE ACT--APPLICATION TO BE INCORPORATED AS VILLAGE--BEST INTERESTS OF INHABITANTS OF AREA--NO OPPOSITION TO APPLICATION--MUNICIPAL BOARD ACT, S. 27(3)--VILLAGE SERVICES ACT,SS. 3(4), 12(1), 13(1),(3), 13A(1),(2), 38, 61--WATER ACT, S.17(1)

This is an application by certain ratepayers of Waverley in the County of Halifax to be incorporated as a village.

HELD: The application is approved and Waverley is granted village status.

Section 13A(1) of the Village Services Act sets out the test to be applied by the Board in determining whether the Act shall apply: the Board shall order that the Act apply to a village "if it appears to the Board to be in the best interests of the inhabitants of the area." The Board is satisfied it is in the best interests of the inhabitants of Waverley that village status be granted. Twenty-two witnesses testified and all were in favour of village status. No one appeared in opposition to the application, and the County of Halifax, the City of Dartmouth and the Town of Bedford all indicated their support for the application. The Board agrees with the following arguments of Counsel for the applicants:

1. Waverley has always considered and called itself a village and granting village status legitimizes what residents consider Waverley to be.

2. Village status would be a natural progression or evolution toward more local autonomy and input into decision making.

3. The residents would have more decision making powers in relation to the provision of services, particularly in the area of recreational planning.

4. The area known as Waverley would have defined boundaries.

5. The area would be identified and accepted by other governing bodies and so improve representation of the constituents.

An existing body corporate with taxing powers providing services in the area in question, the Waverley Ratepayers' Association, should be dissolved and its assets and liabilities transferred to the new Village.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Village Service Act, R.S.N.S. 1967, Chapter 329, as amended,

- and -

IN THE MATTER OF: The application of **CERTAIN RATEPAYERS OF WAVERLEY**, in the Municipality of the County of Halifax to be incorporated as a Village.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH SALTON, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: PAUL B. MILLER, LL.B., on behalf of the applicant ratepayers and the Waverley Ratepayers Association;

ROBERT G. CRAGG, Q.C., on behalf of the Municipality of the County of Halifax;

SUZANNE M. HOOD, LL.B., on behalf of the City of Dartmouth.

DECISION

A hearing was held by the Board in the Canadian Legion Hall at Waverley, pursuant to Section 13 s.s. (1) of the Village Service Act, R.S.N.S. 1967, Chapter 329 as amended, on April 16, 1986, and in the evening of April 17, 1986, for the purpose of determining whether the Village Service Act should apply to the Village of Waverley. Section 13(1) reads as follows:

> "If a majority of the votes polled are in favour of this Act applying to the village, then the Board shall hold a hearing with respect to the requisition."

The relevant facts leading up to the Board's hearing are outlined as follows:

On September 27, 1985, W. Lockhart, the Chairman of the Waverley Ratepayers Association wrote a letter (Exhibit W-1) to the Sheriff of Halifax County, Keith Roberts, enclosing a requisition for a poll of ratepayers signed by 36 ratepayers of Waverley, to determine whether or not a majority of the inhabitants of Waverley are in favour of the Village Service Act being declared to apply to the Village. Also enclosed in the letter from Mr. Lockhart was a description of the proposed boundaries and a map. Copies of the requisition were forwarded to the Clerk of the Board and to the Clerk of the Municipality of the County of Halifax pursuant to s.s. (4) of Section 3 of the Village Service Act.

The following exhibits were filed at the commencement of the hearing:

1. Requisition to the Sheriff dated September 27, 1985 - Exhibit W-2;
2. Report to the Board from Sheriff Roberts dated November 4, 1985 - Exhibit W-3;
3. Supplementary Report to the Board from Sheriff Roberts dated January 13, 1986 - Exhibit W-4;
4. Copy of metes and bounds description of proposed Village boundaries - Exhibit W-5;
5. Letter to the Board dated April 1, 1986 from Watershed Association Development Enterprises

- Exhibit W-6;

6. Letter to the Board dated April 15, 1986, from Kenneth A. MacInnis, Solicitor for the Town of Bedford advising that the Town would not be participating in the hearing. - Exhibit W-7

7. Letter to the Board dated April 15, 1986, from Dan R. English, Chief Administrative Officer of the Town of Bedford advising that "Bedford Town Council fully supports the application of the Waverley Ratepayers Association for Village Status". - Exhibit W-8

8. Letter to the Board dated April 16, 1986, from Suzanne M. Hood, Solicitor on behalf of the City of Dartmouth advising that City officials and representatives of the ratepayers of Waverley have "agreed upon some revisions to the proposed boundary for the Village of Waverley". The letter further states that:

"We have agreed upon a boundary adjustment in the Lake Charles area where the City of Dartmouth owns lands to adjust that boundary so lands owned by the City of Dartmouth adjacent to the lake and running back towards the City's Industrial park will remain outside the boundaries of the Village of Waverley if incorporation is granted under the Village Services Act.

We have also agreed that the original boundary set under amendments to the Act establishing the Waverley Ratepayers Association be used in the Lake Major Watershed area. Some Dartmouth Watershed lands will therefore remain within the boundaries of the proposed Village of Waverley but no more than have always been there under the 1965 Act.

> On the basis of these agreements the City of Dartmouth will not be continuing to participate in the hearing before the Nova Scotia Municipal Board with respect to the application for Village status only.
>
> To clarify the position of the City of Dartmouth, if at any time in the future application is made for, for example town status, the City of Dartmouth would reserve the right to make representations to the Municipal Board with respect to the boundary of any proposed town." Exhibit W-9

9. Map forwarded to the Board by the Sheriff showing the area proposed for Village status Exhibit W-10.

The report from the Sheriff (Exhibit W-3) stated that he had received on October 1, 1985, a requisition bearing the names of 36 Waverley ratepayers requesting that a poll be taken under the provisions of the Village Service Act. The report stated further that the Sheriff conducted a poll in Waverley on November 2, 1985, in accordance with the Village Service Act and of 291 eligible voters, 246 ballots were cast with 198 in favour of village status and 48 against.

At the request of the Board the Sheriff submitted a supplementary report to the Board dated January 13, 1986, containing additional information required under the provisions of s.s. (1) of Section 12 of the Village Service Act. This report indicated that 2145 persons reside in the area of Waverley proposed for village status and the area involved is 21,263 acres.

The Clerk of the Board prepared a Notice of Hearing and arranged that it be advertised in the Chronicle Herald and the Mail-Star newspapers by three insertions to appear on March 26, 1986, April 2, 1986, and April 9, 1986. The Clerk of the Board mailed copies of the Notice of Hearing to the following persons on March 14, 1986:

a) Paul B. Miller;

b) The Clerk of the Municipality of the County of Halifax;

c) The Clerk of the Town of Bedford;

d) The Clerk of the City of Dartmouth;

e) The Sheriff of Halifax County;

f) The Minister of Municipal Affairs;

g) The Deputy Minister of Municipal Affairs;

h) Councillor Gordon Snow.

Paul B. Miller filed with the Board an Affidavit sworn to on April 14, 1986, (Exhibit W-11) indicating that the Notice of Hearing approved by the Board was advertised in the Halifax Herald on March 26, 1986, April 2, 1986 and April 9, 1986.

At the commencement of the hearing counsel for the Applicants, the Municipality of the County of Halifax, and the City of Dartmouth were requested by the Board to make opening statements.

Mr. Miller in his opening statement indicated that he was retained by the majority of the persons who signed the requisition to the Sheriff and he was also retained by the Waverley Ratepayers Association, a body corporate, incorporated under Chapter 108 of the Acts of Nova Scotia 1965, a private

Act of the Legislature by which all ratepayers of School Section 144 of the Municipality of the County of Halifax are constituted a body corporate. A copy of the statute incorporating the Waverley Ratepayers along with a copy of Chapter 126 of the Acts of 1967 amending the original Act was filed as Exhibit W-25.

Mr. Miller stated that an agreement had been reached the night before the hearing by representatives on behalf of the applicants and the City of Dartmouth whereby the proposed boundary lines of the proposed village were amended to the mutual satisfaction of both parties.

Robert Cragg, solicitor for the Municipality of the County of Halifax stated that this Municipality supported the application and he would be present at the hearing but would not take an active role in the hearing. He indicated that his role would be to ensure that the best interests of the Municipality were looked after.

Suzanne M. Hood, solicitor for the City of Dartmouth was in attendance at the commencement of the hearing and informed the Board that on the basis of an adjustment to the boundaries of the proposed village having been agreed upon the City would not be further participating in the hearing.

Under the provisions of s.s.(3) of Section 13 of the Village Service Act the Board is obliged to hear "any interested person or municipality" and under the provisions of Section 13 A(1) of the Village Service Act "If it appears to the Board to be in the best interests of the inhabitants of the area it shall order that the Act apply to the Village".

The hearing of the application occupied a full day on April 16, 1986, and from 7:00 - 9:30 o'clock on the evening of April 17, 1986. A total of 22 witnesses testified in favour of Village Status for Waverley and no one appeared in opposition. Mr. Miller called 6 witnesses and the remaining 16 witnesses appeared as interested persons.

The witnesses called by Mr. Miller were John Hartlen, William Coulter, Gordon Snow, Keith Boutilier, Harold Dillon and William Lockhart.

Those witnesses appearing as interested persons were Gary Widmeyer, Sheila Scott, Velma Keevill, Debbie Billard, Greg MacKay, Wade Junek, Don Day, Sheila Keizer, Maureen Kirk, David Miller, Laine Kenney, Silvia Isenor, Gary Sirota, Anna Graham, Wayne Decker and Kim Conrad.

John Hartlen was the first witness called by the Applicants. He is a resident of Waverley and does history research as a hobby. He stated that in his opinion there is a sense of continuity, permanency or resiliency about the Waverley community that has evolved over a long period of time which has earned it the privilege and responsibility of being called a Village. He briefly outlined the history of Waverley pointing out that a portion of the road from Halifax to Truro along the western side of Lake Thomas was opened to wagons about 1778. By 1819 a second road was built from Dartmouth along the eastern sides of Lakes Charles, William and Thomas to meet the first road at Fall River. About 1829 a shorter road, the present Waverley to Dartmouth road, was built from Dartmouth directly along the shores of the lakes. The building of the Shubenacadie Canal was started in 1826. In 1843 the present road from Waverley to Bedford was commenced and in 1861 a road from Waverley to Windsor Junction was built to facilitate gold mining which began in Waverley in that year. Mr. Hartlen stated that there was some settlement in Waverley as far back as the 1830's. He speculated that the name "Waverley" was taken from Sir Walter Scott's "Waverley Novels".

In its early stages Waverley was an agricultural community up to about 1861 when it entered upon four decades of heavy industrial activity in the form of two major industries, gold mining and the manufacturing of black powder and dynamite.

Mr. Hartlen concluded his remarks by offering two comments. Firstly he said he was not enthused over having what he described as another bureaucratic cobweb. Secondly, he said he preferred to see Waverley attain Village status as he thought this would give a stronger voice to the people of Waverley in the decision making process.

The next witness called by the Applicants was William Coulter, a professional engineer employed by the Nova Scotia Department of Environment for the past 12 years as an environmental engineer. He appeared under subpoena. Mr. Coulter has been involved in environmental matters concerning the Waverley area since 1976: firstly as a member of the Arsenic Task Force in 1976, secondly with respect to an environmental review of the Cobequid Industrial Park Development between 1979 and 1982

Keith Boutilier was the next witness to testify. He is the Chairman of the Municipality's Public Participation Committee (P.P.C.) for District No. 14 and appeared under subpoena. He identified Exhibit W-21 as a draft copy of a Municipal Planning Strategy (M.P.S.) for District No. 14 and Exhibit W-22 as a draft Zoning By-law for District No. 14. He stated that he expects the Municipal Council to approve the draft M.P.S. in the fall. He said that his 22-member committee has worked on the preparation of the M.P.S. for nearly three years. He stated that neither he nor his committee have any concerns about the community of Waverley achieving village status. He stated that he did not perceive any problem with the proposed village boundaries from a planning point of view.

Evidence was given by Harold Dillon who was called by Counsel for the applicants. Mr. Dillon has resided in Waverley for the past 6½ years. He is employed by the Department of Housing as the Co-Ordinator of Planning. He is qualified both as an architect and a planner. He has been a member of a committee of the Waverley Ratepayers' Association which studied the proposed incorporation of the Village under the Village Service Act. He said he entered into this study with no preconceived ideas about "incorporation". He identified Exhibit W-25 as a copy of the statute incorporating the Waverley Ratepayers Association being Chapter 108 of the Statutes of Nova Scotia 1965 entitled "An Act to Incorporate School Section 144 Ratepayers Association of the County of Halifax" assented to on March 30, 1965.

Mr. Dillon stated that the ratepayers' committee spent over a year trying to determine what status the community of Waverley should seek and also determining what the boundaries should be. He said his committee reported to the Annual Meeting of the Waverley Ratepayers in 1985 and the meeting favoured seeking incorporation as a village under the Village Service Act. He indicated that Waverley is at present a "group of houses in a rural area". He considered that it is important for people in a community to know where their boundaries are. Although the boundaries which apply to the Waverley Ratepayers' Association are set forth in the incorporating statute he seemed to think that the people of Waverley did not know precisely where these boundaries were on the ground and he thought that bundaries which were tied in to known physical features would be more acceptable as they would be more readily identified. He also felt that by virtue of being an incorporated village there would be a greater recognition of the community by government and by municipalities and therefore it would have a stronger voice in planning and environmental issues affecting the community. He also felt that incorporation would assist in preserving the community's heritage and lifestyle.

Mr. Dillon referred to Section 38 of the Village Service Act which sets out the powers of village commissioners which include the procurement and provision of services such as street lighting, fire protection, sewers and drains, water supply, electric light and power, streets, roads and sidewalks, police protection, recreational facilities and garbage collection.

He felt that the community would be interested in implementing at least some of these services if village status were achieved.

Mr. Dillon considered that the community of Waverley could be better served if incorporation as a village takes place and the village could pass some By-laws under Section 42 of the Village Service Act. He indicated that no draft By-laws had been prepared but the power to pass by-laws was important to the community and the power to enforce the by-laws if required was important.

Mr. Dillon made reference to the financial implications of being an incorporated village. He was of the opinion that the tax raising authority under the Village Service Act would be better understood than under the existing Waverley Ratepayers' Act. He could not forsee any significant changes being made under the Village Service Act from the existing practice with respect to taxes.

When asked about the future of the Waverley Ratepayers' Association, if and when incorporation under the Village Service Act takes place, Mr. Dillon thought that the ratepayers' association could be wound up under the provisions of Section 61 of the Village Service Act. Section 61 reads as follows:

> "When a proclamation respecting an area has been issued under Section 13 or under subsection (2) of Section 60 and there are one or more commissions, boards or similar bodies serving the same or approximately the same area, then each such other commission, board or similar body may convey to the commissioners to whom the proclamation applies, all its assets; and the commissioners to whom the proclamation applies may receive the assets and assume all the liabilities of such other

> commission, board or similar body; and the Governor in Council may then by proclamation dissolve such other commission, board or similar body."

Mr. Dillon identified a proposed budget for 1986 for the Waverley Ratepayers' Association filed as Exhibit W-27 and stated that a budget for the Village of Waverley would be similar to this one which provides for operating expenses of $20,650.00 and provides for a proposed area rate of 5¢ per $100.00 of assessment. Based on an assessment of $51,750,000 the revenue generated would amount to $25,875 and there would be a surplus of $5,225.

A proposed administrative set-up for the village was presented to the Board by Mr. Dillon and filed as Exhibit W-27. It makes provision for three Commissioners, a Clerk, a By-law Officer, a Fire Chief and committee chairpersons for committees on finance, planning and development, recreation, publicity, education and village services.

Mr. Dillon referred to the map filed as Exhibit W-28 showing the proposed village boundaries outlined in black and stated that these boundaries were agreeable to his committee and all abutters. He also referred to the map filed as Exhibit W-12 which shows a number of boundary lines as follows:

1) yellow lines denote the Waverley Ratepayers' original proposed boundaries for the village;
2) orange lines denote the 1982 boundaries of the Waverley Ratepayers' Association;
3) red lines denote the original Waverley

Ratepayers' Association boundaries as of 1965;

4) blue line denotes the western boundary of the Lake Major watershed which runs through Waverley;

5) black lines denote the proposed village boundary lines as resolved on April 16, 1986.

William Lockhart, a resident of Waverley for 25 years and the Chairman of the Waverley Ratepayers' Association (W.R.A.) for the past four years was the last witness called by the Applicants. He is of the opinion that the W.R.A. was not recognized by other levels of government as the voice of the community. He stated that the relationship between the W.R.A. and the Municipality of the County of Halifax has improved after much difficulty in the past. He is of the opinion that Waverley would have more success in obtaining grants etc if it achieved village status. He stated that the W.R.A. would like to have a transition period to allow the transfer of assets and responsibilities from the W.R.A. to the Village Commissioners. He thought there would be no necessity for the W.R.A. once Waverley became an incorporated Village, although he had no definite plans for the dissolution of the W.R.A., if village status was approved. He was of the opinion that village status would instill a sense of community pride and a stronger sense of identity for the residents of Waverley. He said that the matter of seeking either town or village status for Waverley started back in 1981 but town status was ruled out as not being economically feasible. He stated that the fiscal year of the W.R.A. was the calendar year.

Following the evidence of Mr. Lockhart the hearing was adjourned to Thursday evening April 17, 1986, at 7:00 p.m. to hear the evidence of any interested persons. The names of those interested persons who testified on April 17th are listed on page 7 of this decision. It is not the intention of the Board to summarize the evidence of each of those witnesses who testified pursuant to s.s. (3) of Section 27 of the Municipal Board Act, Statutes of Nova Scotia 1981 c. 9 which reads as follows:

> "Any person may appear and give evidence on any matter before the Board, but may not participate in the hearing except as permitted by the Board."

All the persons who testified pursuant to s.s. (3) of Section 27 of the Municipal Board Act indicated their support for the application. One of these persons is Gary Widmeyer, the Controller of Municipal Contracting Ltd. a corporation which owns 1250 acres of land in the Waverley area most of which is situate within the boundaries of the proposed village. Mr. Widmeyer believed his company was one of the largest municipal taxpayers in the Waverley area with taxes in the $50,000.00 range. He indicated his concern about the possibility of increased taxes as the result of village status being approved for Waverley. He indicated that the company he represents would not likly receive any benefit from an increase in the tax rate. He, however supports the application and his company was prepared to accept an increase in taxes in the 5 - 10% range.

Spokespersons on behalf of the Lakeview Ratepayers Association, the Cheema Aquatic Club, Santa's Craft Workshop, the Frame Homeowners Association, the Silversides Residents' Association and the Waverley Ratepayers' Association all indicated their support for village status. They pointed out the strong feeling of pride of Waverley residents in their community and a desire to be identified with the community.

Don Day, a resident of Silversides in Waverley and the Fire Chief of Waverley testified that Waverley's present boundaries are not well known and appear to move depending on Department of Transportation "whim". He was of the opinion that the definite boundaries proposed for the village would help to solve fire department dispatching problems caused by the present boundary uncertainties. He was of the opinion that village status would provide the community of Waverley with a common goal. He considered that the community's image was important and this image would be enhanced by having the village incorporated. As a 15-year resident of Waverley Mr. Day stated that when he first came to Waverley there was not the same good sense of community that exists today.

Ms. Silvia Isenor a 29-year resident of Waverley and the owner of a 140 acre tract of land in Waverley gave evidence in support of the application. She was one of the original ratepayers in Waverley who constituted the W.R.A. when it became an incorporated body by virtue of ch. 108 of the Statutes of Nova Scotia 1965. She was of the opinion the village status would foster a community feeling and would tend to bring together the people of Waverley.

Kim Conrad, a quarry manager, who resides at 82 Ridge Avenue, Waverley expressed his concern that many people seem to have a negative attitude to industrial operations. He was worried about over-regulation. He was satisfied with the location of the proposed boundaries for the village. He strongly expressed the necessity for people to have a positive attitude to industrial development to help create the tax base needed to finance an expansion of the village. Subject to these concerns he was in favour of the application.

William Lockhart was recalled as a witness to explain to the Board the details of an adjustment made to the southern portion of the proposed village boundary as a result of a meeting between representatives of the applicants and John MacInnis, a land surveyor representing the City of Dartmouth. Mr. Lockhart pointed out that the black line shown on the map filed as Exhibit W-28 depicting the proposed village boundaries had originally been satisfactory to the City of Dartmouth but was not now satisfactory to Dartmouth with respect to that portion of the southern village boundary lying between highway No. 118 on the west and the northern portion of Lake Charles and the Shubenacadie Canal on the east. Mr. Lockhart then outlined in red on the map filed as Exhibit W-28 an adjustment to the proposed boundary which had resulted from the meeting with Mr. MacInnis the surveyor. By altering the proposed boundary as described by Mr. Lockhart the village area would be slightly reduced. The map filed as Exhibit W-12 shows outlined in yellow the original boundary lines proposed for the village, outlined in red the original W.R.A. boundaries, outlined in orange the W.R.A. boundaries as altered in 1982, outlined in blue the Lake Major watershed area and outlined in black the proposed boundaries as resolved on April 16, 1986.

Mr. Lockhart stated that the parcel of land which would be deleted from the area of the proposed village by reason of the modification of the proposed boundary is a parcel of land owned by the City of Dartmouth which lies within the bounds of a designated Regional Park but is outside the City of Dartmouth boundaries.

Mr. Lockhart proposed the names of three persons which had been selected by the Village Services Committee of the W.R.A. for recommendation to the Board. These persons are :

1) Harold Dillon;
2) William Lockhart;
3) Robert J. MacDonald.

He recommended that if the Board was prepared to grant an order conferring village status on Waverley, that the effective date be September 12, 1986, which would coincide with Waverley's 125th anniversary of the discovery of gold in Waverley which has considerable historical significance for Waverley.

Section 13A(1) of the Village Service Act sets out the test to be applied by the Board in determining whether the Act shall apply. That test is that the Board shall order that the Act apply to a village "if it appears to the Board to be in the best interests of the inhabitants of the area".

The Board is satisfied that this application meets the test of Section 13A(1) of the Village Service Act and that an order should be made pursuant to Section 13A(1). It appears to the Board from the evidence that it is in the best interests of the inhabitants of Waverley that village status should be granted. Twenty-two witnesses testified at the hearing before the Board and all were in favour of Waverley attaining village status. No one appeared in opposition to the application. It is significant that the Municipality of the County of Halifax in which municipality the proposed village is situate, the City of Dartmouth whose watershed lands are partly situate in the proposed village and the Town of Bedford which abuts the proposed village all indicated their support that the application be approved.

In concluding that Waverley should be granted village status as being in the best interests of the inhabitants of Waverley the Board agrees with the following arguments set forth by Counsel for the applicants in his post hearing submission, viz:

> "1. Waverley has always considered and called itself a village and the granting of _Village Services Act_ status legitimizes what the residents of Waverley consider the community to be: a village.
>
> 2. The residents of Waverley consider the granting of _Village Services Act_ status to be a natural progression or evolution toward more local autonomy and input into decision making.
>
> 3. _The Village Services Act_ gives more

decision making powers to the Village Service Commission in relation to provision of services specified in the Act, and particularly in the area of recreational planning. While many of these services are now being provided or supervised by the Waverley Ratepayers Association its authority to do so under the Waverley Ratepayers Act is limited and not clearly defined.

4. The granting of Village Services Act status with defined boundaries will more clearly establish the area known to be and considered to be within the Village of Waverley. Current boundaries do not follow natural contours and are difficult to ascertain, whereas the boundaries proposed, as amended, are clearly identifiable.

5. An order incorporating Waverley as a Village pursuant to the Village Services Act confers a status on Waverley which is identified and accepted by other governing bodies. In the past Waverley, and other areas, have had difficulty in communicating their representation of the constituants due to the fact that ratepayers associations are not clearly defined entities. If granted Village Services Act status, Waverley expects and has been assured that it will be consulted by the Municipality of the County of Halifax concerning matters affecting Waverley even though these matters may not fall directly under the powers and responsibilities as outlined in the Village Services Act. This recognition, although not clearly spelled out in the Village Services Act, is a most important reason for incorporating as a Village.

With reference to boundaries, it is submitted that the boundaries proposed, as amended, are reasonable and are as clearly defined as possible short of having the boundaries surveyed which would in all likelihood be of such a cost that it could not be afforded by the residents. The boundaries, as amended, can be supported from an historical perspective, and from both a political and planning perspective. The boundaries, as amended, have been agreed to by all abutting municipalities, abutting ratepayers' districts, and by the Municipality of the County of Halifax. This agreement was reached after many hours of consultation with the respective parties, and in some cases compromise between Waverley and abutting municipalities and districts. Inquiry was made from both the City of Dartmouth and the Municipality of the County of Halifax as to whether the boundaries could be certified by the respective

> municipalities, or their surveyors, and we were advised that there is no precedent for "certifying" boundaries. Indeed, a surveyor would not "certify" boundaries unless they were properly surveyed. It does not appear to have been a requirement that boundaries be surveyed in other applications for incorporation as a village under the Village Services Act, and certainly when Bedford applied for town status before the Public Utilities Board it was not required to have surveyed boundaries. Therefore, it is respectfully submitted that the boundaries as proposed and as amended should be acceptable. These boundaries are easily identifiable and should not result in confusion".

Clause (2) of Section 13A(1) of the Village Service Act states what must be contained in an order of the Board made pursuant to s.s. (1) of Section 13A(1) which reads as follows:

> "(2) The order made pursuant to subsection (1) shall:
>
> a) declare that on and after a date to be named in the proclamation this Act shall apply to the village;
>
> b) define the boundaries of the village to which this Act is to apply;
>
> c) appoint three commissioners for the village for the carrying out of the purposes of this Act."

At the hearing of the application, the Board expressed its views that to avoid having two bodies with taxing authority in the village the Waverley Ratepayers Association should be dissolved upon the incorporation of the Village of Waverley and that the statute creating the Waverley Ratepayers Association as a body corporate with powers to tax be repealed. Mr. Miller, counsel for both the applicants and the Waverley Ratepayers' Association, in his post-hearing submission dated May 9, 1986, addressed these views of the Board at page 3 as follows:

> "With reference to implementation, it has been suggested that provisions should be made for the repeal of the Waverley Ratepayers Act contingent upon the granting of Village Services Act status to avoid duplication of authority, double taxation, and provide for the orderly transferral of powers, assets and liabilities from the Waverley Ratepayers Association to the Village Service Commission. In this regard we have had numerous consultations with the Legislative Counsel's office, and the Hon. Kenneth Streatch M.L.A. for the Bedford-Musquodoboit District which includes Waverley. I am enclosing a copy of a letter dated May 2nd, 1986 by Mr. Streatch confirming his support in this regard. I am also enclosing a copy of the Private Members Bill which was submitted on May 8th to the General Assembly of the Legislature. Notice of the Private Members Bill has been submitted to the Halifax Herald for publication. I am enclosing a copy of this Notice with this submission."

The draft bill No. 114 forwarded by Mr. Miller reads as follows:

> "1 If the Nova Scotia Municipal Board orders, pursuant to the Village Service Act, that the Act shall apply to the Village of Waverley, then, effective on, from and after the date on which, according to the proclamation made by that Board, that Act begins to apply to the Village,
>
> a) all right, title and interest of the Waverley Ratepayers Association, incorporated by Chapter 108 of the Acts of 1965, An Act to Incorporate School Section 144 Ratepayers Association of the County of Halifax, in any real or personal property or otherwise and all rights and privileges of the Waverley Ratepayers Association are vested in The Village Commissioners of Waverley, constituted pursuant to the Village Service Act;
>
> b) all the obligations and liabilities of the Waverley Ratepayers Association are the obligations and liabilities of The Village Commissioners of Waverley;
>
> c) the Waverley Ratepayers Association is dissolved; and
>
> d) said Chapter 108 is repealed."

The Board is of the opinion that the Waverley Ratepayers' Association should be dissolved and its assets and liabilities transferred to the Village Commissioners of the Village of Waverley, and the Act incorporating the Waverley Ratepayers' Association be repealed. This is to avoid any duplication of services provided by the W.R.A. and the Village Commissioners and to avoid the possibility of both bodies exercising their right to impose taxation on the ratepayers of Waverley. The Board is satisfied that Bill No. 114 which received Royal Assent on May 26, 1986, satisfies the Board's concern that the Waverley Ratepayers' Association be dissolved and its incorporating statute repealed.

The Board for the reasons stated is pleased to approve the application that the Village Service Act shall apply to Waverley effective September 12, 1986. The boundaries of the village shall be those boundaries set forth in the metes and bounds description attached to this decision and marked as Schedule "A". These boundaries are substantially the same as those contained in the metes and bounds description filed with the Board as Exhibit W-34.

The Board hereby appoints:

1) Harold Dillon;
2) William Lockhart;
3) Robert J. MacDonald

as Commissioners for the Village of Waverley.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 5th day of June, A.D., 1986.

RH Blois

R.H. BLOIS, Chairman.

E A Salton

ELIZABETH SALTON, Vice-Chairman

RICHARD L. WELDON, Member.

NOVA SCOTIA MUNICIPAL BOARD

SCHEDULE "A"

Boundaries of the Village of Waverley as defined by the Municipal Board

BEGINNING on the eastern boundary of the Waverley (Porto Bello) Road at a point where said road boundary is intersected by the northern boundary of the City of Dartmouth, said point also being on the southern boundary of the Nova Scotia Power Corporation transmission line right-of-way;

THENCE easterly along the southern boundary of the Nova Scotia Power Corporation transmission line right-of-way, a distance of one thousand (1000) feet to a point;

THENCE in a southerly direction, distant one thousand (1000) feet easterly from the Waverley Road and parallel thereto, to the intersection of the City of Dartmouth and Cole Harbour-Westphal boundaries;

THENCE in an easterly direction following the Cole Harbour-Westphal boundary, to the centre line of Lake Major;

THENCE northerly following the centre line of Lake Major to a stream known as Soldier Lake Gullies, which flows into the northern tip of Lake Major;

THENCE in a northerly direction along said stream to Crown Post No. 1715 at the eastern boundary of the John Spry Morris Grant;

THENCE in a northerly direction along the eastern boundary of the John Spry Morris grant and the eastern boundary of the Edward Parker grant, to the southern boundary of the Daniel Drew grant;

THENCE in a westerly direction along the southern boundary of the Drew grant to the eastern shore of Soldier Lake;

THENCE by the prolongation westerly of the southern boundary of the Daniel Drew grant, crossing the said Soldier Lake to the western shore thereof;

THENCE in a northerly direction along the western shore of Soldier Lake to the northern tip of the point in said lake;

THENCE in a southerly direction along the western side of said point to the northern boundary of the Taylor grant;

THENCE in a westerly direction along the northern boundary of the Taylor grant, to the eastern boundary of Highway No. 2;

THENCE westerly crossing Highway 2 at the north boundary of the Cowper property to the centre of Lake Thomas;

THENCE northeasterly by the centreline of Lake Thomas to the culvert where Highway 102 crosses Lake Thomas;

THENCE southwesterly along the eastern side of Highway 102 to the Canadian National Railway overpass;

THENCE southerly following the Canadian National Railway line to the northwestern shore of Rocky Lake;

THENCE easterly following the Northern Shore of Rocky lake, 2,100 feet±;

THENCE southerly intersecting a small Island and following the centre line of Rocky Lake to the causeway where Canadian National Railway crosses Rocky Lake;

THENCE following the eastern boundary of the Canadian National Railway to the Town of Bedford;

THENCE following the Town of Bedford Boundary southeasterly to intersect the Canadian National Railway at Wright's Brook;

THENCE northeasterly following the northwest boundary of the Canadian National Railway to the centreline of Marshall Brook;

THENCE generally southeasterly along the centreline of Marshall Brook, said brook being the boundary line of the City of Dartmouth to the northern boundary of lands conveyed to the City of Dartmouth as recorded in Book 2126, page 593, at the Registry of Deeds, Halifax;

THENCE easterly following the aforesaid northern boundary of lands conveyed to the City of Dartmouth to the western boundary of Highway 118 (Lakeview Drive);

THENCE northerly along the western boundary of Highway 118 parallel to the centreline of the north-bound lane and two hundred feet (200') therefrom to the centreline of the Shubenacadie Canal system;

THENCE southeasterly by the centreline of the Shubenacadie Canal system to the City of Dartmouth boundary;

THENCE northeasterly along the northwestern boundary of the City of Dartmouth to the southwestern boundary of Route 318 (Waverley Road);

THENCE northwesterly along the southwestern boundary of Route 318 to a point on the southwest prolongation of the first described course;

THENCE northeasterly along the aforesaid prolongation to the point of beginning.